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# CONSTITUTION-MAKING GONE WRONG

David Landau\*

## ABSTRACT

*With the recent wave of regime change in the Middle East, the process of constitution-making must again become a central concern for those interested in comparative law and politics. The conception of constitutional politics associated with Jon Elster and Bruce Ackerman views constitution-making as a potentially higher form of lawmaking with different dynamics than ordinary politics and states that, ideally, constitution-making should be designed so as to be a relatively deliberative process where the role of group and institutional interests is deemphasized. I argue that a focus on achieving deliberation and transformation through constitution-making is unrealistic in certain situations and that theorists should instead often focus on avoiding worst-case scenarios of authoritarian regimes or breakdowns of order. Constitution-making moments must not be idealized; they are often traumatic events. In these situations, the central challenge of constitution-making is not to achieve a higher form of lawmaking but rather to constrain unilateral exercises of power. I use two recent Latin American examples where the constitution-making process was problematic to illustrate the difficulty. If political forces in assemblies are left unconstrained or poorly constrained, they can reshape politics to create a quasi-authoritarian regime (as occurred in Venezuela), or their attempt to impose a constitution on a reticent minority may create a constitutional breakdown (as nearly occurred in Bolivia). Some of the normative recommendations of followers of the dominant model—for example, that constitution-making should be highly participatory and should be undertaken in a specialized constituent assembly—emerge as problematic under this reconceptualization because they may increase the likelihood of a worst-case outcome. Finally, I apply my theory in order to*

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*get some analytic leverage on the current constitution-making process in Egypt. Contrary to most observers, I argue that the military may be playing a pro-democratic role by helping to constrain otherwise dominant electoral groups.*

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## I. INTRODUCTION

The events of the Arab Spring have again placed constitution-making at the forefront of the agenda for scholars of comparative constitutional law

and comparative politics. While the media has fixated on the dramatic falls of authoritarian regimes in places like Tunisia, Egypt, and Libya, the events that are occurring after the regimes have fallen will play a significant role in determining the future of these countries. The hope is that all of these countries will become stable, competitive democracies, but a vast literature in comparative politics makes clear that this is far from an inevitable outcome. New democracies in weakly institutionalized environments may as plausibly become quasi-authoritarian regimes or unstable states.

The key question, then, is how to structure constitution-making processes so as to enhance the prospects that the resulting regime will be a stable and competitive democracy. Since Jon Elster noted fifteen years ago that the field was markedly understudied,<sup>1</sup> there has been an outpouring of high-quality case studies and empirical analyses of constitution-making episodes.<sup>2</sup> But the literature has continued to be dominated by his theoretical conception—that the central challenge of constitution-making is to create an opportunity for constitutional politics to be distinct from normal politics, where constitution makers can debate long-term issues relatively free from the influence of short-term individual, group, or institutional interest. This conception is closely related to Bruce Ackerman's notion of "dualism," that there are periods of time when politics enjoy "constitutional moments," during which the public is more engaged with political affairs and politics as a whole is more deliberative than normal.

In this Article I argue that the "dualist" vision of constitution-making is an overly optimistic way to conceptualize constitution-making. I rely on recent examples where Latin American constitution-making had deeply problematic effects in Venezuela (1999) and Bolivia (2006–2009). I argue that political figures often use constitution-making to carry out their short-term political goals and what differentiates normal political periods from constitution-making periods in these cases is not the motives of the actors but rather the absence of stable rules and institutions. Constitution-making is often undertaken in situations in which existing political institutions have broken down, and the constitution-making process itself is often a challenge to the legitimacy of remaining institutions. The absence of the channeling functions played by political institutions during normal periods can make constitution-making moments particularly dangerous: strongmen or individual parties can manipulate temporary majorities in order to reshape the political system in a manner that is not conducive to

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1. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 364 ("[T]here is not, to my knowledge, a single book or even article that considers the process of constitution-making, in its full generality, as a distinctive object of positive analysis.").

2. For an overview, see *infra* Part II.

competitive democracy. In Venezuela, for example, President Chávez was able to seize sole control over constitution-making in 1999 and to use that control to marginalize opposition groups. The result has been a competitive authoritarian regime that persists to this day. A second risk is that attempts by groups to impose unilateral constitutions will exacerbate fissures between groups and lead to a fundamental breakdown of order—this very nearly occurred in Bolivia in 2008 before majority and minority forces were able to impose a “pacted” constitution.

Thus, in many situations, the central challenge of the design of constitutional politics may be in finding ways to control uses of power, and in particular, in ensuring that powerful individuals and groups are not able to use the constitution-making process to impose unilateral projects, rather than in switching politics onto its higher track. Such a conception of constitution-making views it as an essentially preservative rather than transformative process: it seeks to avoid worst-case outcomes that come from abuses of the process rather than aspiring to create the ideal state.

This conception in turn casts some of the key design recommendations from existing literature in a more problematic light. For example, most analysts argue in favor of making constitution-making very participatory, but as the Bolivian example shows, high levels of participation during constitutional moments can sometimes threaten the constitutional process and stability of the state. Further, the debate about whether to write constitutions in ordinary legislatures or specialized parliamentary assemblies may hinge not on the question of which body is more likely to produce higher-track lawmaking, but instead on the likelihood that constitutional assemblies may be harder for external institutions like courts and legislatures to control. Finally, this perspective shines light on the need to make constraints credible. Evidence from all three countries studied here indicates that oft-suggested models relying on external institutions, and particularly courts, to control assemblies may fail in many situations. When push comes to shove, courts may lack the legitimacy and capacity to control constitution makers.

I close by using my framework to gain some analytic leverage on recent events surrounding the constitution-making process in Egypt.<sup>3</sup> Some observers have seen the Egyptian process as a potentially “dualist democracy” moment, but I argue that it is probably more fruitful to focus on avoiding a worst-case outcome. A series of factors have potentially made the risks of unilateral exercises of power quite high in the Egyptian case: elections were timed for a period in which some political forces were much more organized than others, there was a near-consensus rejection of

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3. See *infra* Part V.

attempts to bind the constitutional assembly by a set of principles or by some other means, and actors and analysts have adopted a position that the military must be wholly extracted from its political role as quickly as possible. The military—which has typically been seen as an anti-democratic force—emerges under this theory as a more complex actor that, under certain conditions, may help to stabilize democracy in the country. This analysis adds to other recent work, led by Sam Issacharoff, which suggests that new and threatened democracies may need to include some undemocratic enclaves or institutions in order to protect themselves from democratic breakdowns.<sup>4</sup>

The rest of this Article is structured as follows. In Part II, I lay out the conception of constitutional politics held by Elster and Ackerman, show how it infuses much of the work in the field, and then critique that vision by stating that the central concern of constitution-making should instead be on controlling unilateral exercises of power. Part III contains the two case studies of Venezuela and Bolivia. I focus here on how a lack of constraint allowed for the construction of an undemocratic or weakly democratic regime (Venezuela) and how attempts to control an assembly externally, particularly when coupled with high mass mobilization, caused a chaotic struggle that nearly led to a democratic breakdown (Bolivia). Part IV raises some implications from the argument, focusing on the need to make constraints credible and effective and the drawbacks of very high levels of participation. Part V applies the theoretical lens to Egypt, showing how much of the discourse and design seems to misperceive the main challenges involved in constitution-making, and Part VI concludes.

## II. CONSTITUTIONAL POLITICS AS NORMAL (BUT DANGEROUS) POLITICS

### A. *The Dominant Conception*

The concept of constitution-making as a special moment that is qualitatively different from ordinary politics has its roots in theorists like Sieyès and Schmitt. Sieyès for example is often cited as the original exponent of the idea of “original constituent power.” Sieyès argued in essence that the representative bodies of a given state get their power from the people, and the people thus retain a residual right to alter any of the

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4. See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1415 (2007) (arguing that weaker democracies may need to have mechanisms in place that limit the rights of extremist groups as a means of self-preservation); see also Ozan Varol, *The Democratic Coup d'État*, 53 HARV. INT'L L.J. 292, 293–94 (2012) (arguing that militaries are not necessarily anti-democratic actors during democratic transitions).

institutions of a political order.<sup>5</sup> Constitution-making, therefore, involves the right of the people, acting in an extraordinary body, to step outside of the existing political order and to remake it.

But the most sophisticated modern exponent of this idea is Jon Elster. Elster understands that short-term conceptions of interest (whether individual, group-based, or institutional) will always play a substantial role in any political process, including constitution-making.<sup>6</sup> But he argues that constitution-making calls for “impartial and far-sighted reasoning,” which require that members of a constitution-making body be motivated by conceptions of a broader, longer-term public interest.<sup>7</sup> Elster believes that it is difficult but possible to construct an assembly that will in part be motivated by reason and the public interest rather than by narrower conceptions of interest. Some members of an assembly will be motivated by a broader public interest at least some of the time,<sup>8</sup> and the process of deliberation may itself change preferences.<sup>9</sup>

Thus, to Elster the central challenge of constitution-making is to design an assembly that will not be unduly influenced by narrow conceptions of self-interest.<sup>10</sup> He notes that ordinary legislatures are likely to be more influenced by group and institutional self-interest and recommends that constitution-making be undertaken by a specialized assembly.<sup>11</sup> Ordinary legislatures should be given no role either in writing a new constitution or in ratifying one.<sup>12</sup> Moreover, he recommends a balance between publicity and secrecy, since secrecy helps constituents reach hard bargains on difficult issues, while publicity ensures that conceptions of the public interest and principle play a significant role in the constitution-making process.<sup>13</sup>

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5. See EMMANUEL JOSEPH SIEYÉS, *WHAT IS THE THIRD ESTATE?* (S.E. Finer ed., M. Blondel trans., 1963).

6. See Elster, *supra* note 1, at 376–86 (listing types of motivations that might influence constitution makers and discussing their importance); see also JON ELSTER, CLAUS OFFE & ULRICH K. PREUSS, *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* 77 (1998) (“[I]nterest may be the most important motivation in most constituent assemblies . . .”).

7. See Elster, *supra* note 1, at 396.

8. See *id.* at 379–80 (“Although it is true that self-serving arguments tend to dress themselves in public-interest garbs, the converse argument—that all impartial argument is nothing but self-interest in disguise—is invalid.”); see also ELSTER ET AL., *supra* note 6, at 78 (referring to the “civilizing force of hypocrisy” in ensuring that some appeals to the public interest are real (emphasis omitted)).

9. See Elster, *supra* note 1, at 387–88 (discussing “transformation of preferences through discussion” (emphasis omitted)).

10. See *id.* at 394 (“[T]he intrinsic importance of constitution-making requires that procedures be based on rational, impartial argument.”).

11. See *id.* at 395 (referring to this as the “most important” normative recommendation).

12. See *id.*; see also ELSTER ET AL., *supra* note 6, at 78 (arguing that publicizing deliberations can help to ensure that arguments are actually based on self-interest but that publicity may lock competing interests into “uncompromising situations”).

13. See Elster, *supra* note 1, at 395.

Elster's ideas are rooted in similar notions to those that inform the work of Bruce Ackerman. Ackerman argues that politics is inherently dualist.<sup>14</sup> Normally, politics works on an ordinary track where citizens themselves have a "limited engagement in public life"—citizens vote but otherwise take relatively little account of public affairs.<sup>15</sup> Meanwhile, private interest groups, bureaucracies, and political parties ensure that the system works well enough at aggregating citizen preferences into political outcomes.<sup>16</sup> But in extraordinary moments, politics can also move on a second, higher track. In these moments, a far higher percentage of the public pays close attention to public affairs than in times of ordinary politics.<sup>17</sup> Indeed, the polity takes on a character of "mobilized deliberation," with members of all political groups debating fundamental ideas in front of broad swaths of the citizenry.<sup>18</sup> Ordinary political allegiances do not disappear during such periods, but citizens are somewhat transformed—the barriers of "apathy, ignorance, [and] selfishness" that govern most citizens during times of ordinary politics dissipate.<sup>19</sup> The broad and deep public discussion that takes place during extraordinary moments of constitutional politics helps to reorient the basic understandings of the polity.

### *B. Implications of the Dominant Conception*

This conception of constitutional politics has been influential in the literature on constitution-making. In this Part, I explore this influence, focusing on three major implications of the model: the view that constitutional conventions rather than ordinary legislatures should be used to draft new constitutions, the view that the power of these assemblies should properly be left unrestricted by other political actors in the system, and the view that constitution-making should be a particularly participatory event.

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14. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). Ackerman's chief point is that "constitutional moments," where the higher track is active, can occur without formal constitutional change. He argues that both Reconstruction and the New Deal constituted such moments even though these were not constitution-writing moments. *See id.* at 34–57. But the moment of actually writing a constitution is a paradigmatic case of higher-track politics: indeed, he views the founding as the third constitutional moment in U.S. political history. *See id.* at 58–80.

15. *See id.* at 234; *see also id.* at 236–41 (explaining the importance of voting during ordinary political moments).

16. *See id.* at 243–51 (making an inventory of "normal political resources" like parties and interest groups).

17. *See id.* at 266–94.

18. *Id.* at 285–88.

19. *See id.* at 287.



### 1. *Constitution-Making Should Be Done by a Specialized Assembly*

As noted above, Elster has argued that writing constitutions in specialized constituent assemblies rather than in ordinary legislatures will help to reduce the role of narrow conceptions of interest in the process.<sup>20</sup> Constitutional assemblies will be less likely to adopt decisions either for partisan ends or in order to aggrandize their own institutional power. Indeed, he considers this point to be the “most important” normative recommendation governing constitution-making.<sup>21</sup> Elster’s point has received considerable support from other scholars. For example, Keith Rosenn has argued that the Brazilian constitution is extraordinarily long, lacked coherence, and is laden down with banal political pacts, largely because it was written by an ordinary congress rather than a specialized assembly.<sup>22</sup> He argues in particular that the ordinary congress had a “short-term perspective and agenda,” which was not conducive to constitutional politics,<sup>23</sup> and that the congress was driven by institutional self-interest to aggrandize its own power in the final constitution.<sup>24</sup> And in a recent edited volume collecting detailed information on constitution-making processes from around the world, Miller concludes that specialized assemblies have “several advantages” over ordinary legislatures, most importantly a higher degree of “popular legitimacy.”<sup>25</sup>

The view that constitutional assemblies are desirable to achieve a genuine constitutional moment is not, however, unanimous. Arato argues that “parliamentary constitution making” may do a better job of ensuring the legitimacy of the constitutional product.<sup>26</sup> He notes for example that ordinary political bodies may help ensure that constitutions are written by consensus and may help ensure that there is a public perception of legal continuity.<sup>27</sup> Further, he argues that the chief value sought by Elster—that constitution-making be done behind a “veil of ignorance” that limits the scope for individuals, groups, and institutions to pursue their narrow self-

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20. See *supra* text accompanying note 11.

21. See Elster, *supra* note 1, at 394.

22. See Keith S. Rosenn, *Brazil’s New Constitution An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 775–77 (1990).

23. See Keith S. Rosenn, *Conflict Resolution and Constitutionalism The Making of the Brazilian Constitution of 1988*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 435, 441 (Laurel E. Miller ed., 2010).

24. See *id.* at 441 (“[A]s a basic political player, Congress had a clear conflict of interest. It is not surprising that the constitutional document that Congress drafted aggrandizes congressional power and confers numerous favors and entitlements upon states, counties, and special-interest groups.”).

25. See Laurel E. Miller, *Designing Constitution-Making Processes Lessons from the Past, Questions for the Future*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 23, at 601, 612.

26. See ANDREW ARATO, CIVIL SOCIETY, CONSTITUTION, AND LEGITIMACY 255–56 (2000).

27. See *id.* at 255.

interest—may be achieved within an ordinary legislature as well as within a specialized constituent assembly.<sup>28</sup> Further, Partlett recently argued that constitutional assemblies may be inferior to ordinary legislatures because they may be easier for would-be strongmen in a given country to control and, thus, may lead to the construction of constitutions that are authoritarian or weakly democratic.<sup>29</sup>

In Subpart IV.B, below, I return to this debate in light of the case studies of Venezuela and Bolivia that I carry out in Part III. I suggest that this debate may be less relevant than it has often been portrayed in the existing literature. If the key to constitution-making is ensuring that unilateral exercises of power are checked, this might be achievable in either a constituent assembly or in an ordinary legislative body. However, there is some evidence from my case studies and from elsewhere that constituent assemblies may be particularly difficult for external institutions to control; they are still linked in the minds of domestic judges and domestic politicians to a view that they are completely sovereign over the rest of the legal order. If this is true, it suggests that ordinary political bodies make safer constitution makers.

## 2. *The Constitution-Making Body Should Have Unlimited Power*

The view championed by both Sieyès and Schmitt is that constitution-making bodies must be “sovereign” and thus placed over the rest of the state.<sup>30</sup> Schmitt, for example, believes that the constitutional assembly is a “sovereign dictator,” which exercises all powers within the state while it

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28. For example, Arato argues that the ordinary legislature can be incentivized to select a new electoral rule during the constitution-making process and that the resulting uncertainty will help to construct such a “veil of ignorance.” See *id.* at 252–53. He also points out that there is significant scope for group self-interest even during a constituent assembly. See *id.*

29. See William Partlett, *Making Constitutions Matter: The Dangers of Constitutional Politics in Current Post-Authoritarian Constitution-Making*, 38 BROOK. J. INT’L L. 1, 19–34 (2012) (drawing off of the experience of President Yeltsin in Russia to show how a president was able to switch the constitution-making process from the ordinary parliament to a specialized constituent assembly in order to control it). In recent work Ginsburg, Elkins, and Blount found no empirical support for a claim that institutions tended to aggrandize their own institutional interest during the constitution-making process, except for the fact that presidents tend to create stronger presidencies when they have substantial power. See Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. SOC. SCI. 201, 213 tbl.2 (2009). This may be explained by the fact that actors are often motivated by goals other than institutional aggrandizement; moreover, in multi-member bodies institutional interests are often swamped by the interests of political parties. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (arguing that U.S. constitutional doctrine misunderstands separation of powers by assuming that institutions resist one another even when controlled by the same party); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (arguing that the assumption that institutions always seek to aggrandize their own power is false).

30. See SIEYÈS, *supra* note 5, at 130–33; CARL SCHMITT, *CONSTITUTIONAL THEORY* 125–26 (Jeffrey Seitzer ed. & trans., 2008).

remains in force.<sup>31</sup> The idea that the constituent assembly is uncontrollable by other institutions is, classically, closely linked to a preference for constituent assemblies and to the dualist theory of constitutional politics in general. The assembly represents the people acting in their role as the constituting power and must be placed above the currently existing political institutions, which represent the constituted power.<sup>32</sup>

As I show below in Part III, this vision remains important in constitution-making practice: both politicians and courts, at least in Latin America, continue to believe that the constituent assembly, which speaks in the name of the people exercising their constituent power, must be placed above the rest of the state and must have the power to reconstitute other political institutions at will. Some recent scholarship also supports this view, arguing that this conception creates space for participatory democracy and allows for moments when “the people” can make their most fundamental political decisions directly—free from the constraints of ordinary politics.<sup>33</sup> Elster acknowledges that external constraints can be put on the constitution-making process, but he argues that such constraints are unlikely to work in practice and does not recommend any of these as part of his normative recommendations.<sup>34</sup>

In contrast, under the theory I develop here, external constraints on the constitution-making body emerge as a key concern. Constitution-making can be easily hijacked by individuals or groups who temporarily enjoy large amounts of power in order to enhance their own position. It can constitute an end-run around existing political institutions not for the benefit of “the people” but rather for the benefit of the particular political force involved. These unilateral exercises of political power can be checked

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31. See SCHMITT, *supra* note 30, at 109.

32. See SIEYÉS, *supra* note 5, at 130–33.

33. See, e.g., Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 CONSTELLATIONS 365, 377–78 (2011) [hereinafter Colón-Ríos, *Carl Schmitt*]; Joel I. Colón-Ríos, *The Legitimacy of the Juridical Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOODE HALL L.J. 199 (2010) [hereinafter Colón-Ríos, *Legitimacy*].

34. See Elster, *supra* note 1, at 374–75 (noting cases like the United States where constituent assemblies ignored instructions from their “upstream” creators). This perspective has also been subject to challenge. Arato, for example, has argued for a post-sovereign model, where the constituent assembly does not have full power over other institutions or even over the constitutional text. See ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION 71–72 (2009). In particular, Arato calls for a two-stage model similar to the South African constitutional process, where an initial, temporary constitution is produced via pacting and where sets of principles in that interim document bind the final constitutional assembly. A court, finally, assesses whether the final constitution is in accord with the basic principles of the interim text. See *id.* at 62–64. Arato argues that this process, most importantly, allows for the possibility of “facilitating learning” between the two stages of the text. See *id.* at 69; see also ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 95–105 (Deborah Lucas Schneider trans., 1995) (arguing that the roundtable processes of constitutional change used in Eastern Europe constituted a new and better model of constitution-making).

in either of two ways: by ensuring sufficient diversity within the assembly itself or by placing external limits on what the assembly can do such as subjecting it to review by courts, ordinary congresses, et cetera. I return to the question of how best to check constitution-making bodies in Subpart IV.A.

### 3. *The Constitutional Process Should Be Highly Participatory*

A third implication of existing literature has been a widespread (but not unanimous) emphasis on making constitutional politics participatory.<sup>35</sup> This idea is again tightly linked to dualism. As Ackerman has argued, these moments of “higher lawmaking” are distinct from “ordinary politics” in the sense that they involve “mobilized [popular] deliberation” where “[a]pathy will give way to concern, ignorance to information, [and] selfishness to serious reflection on the country’s future . . . .”<sup>36</sup> Participation is said to increase the legitimacy of the constitution-making process: it “fosters political dialogue and empowers the people.”<sup>37</sup> Constitutions without a large amount of participation may therefore be “vulnerable to undermining.”<sup>38</sup> Moreover, participation is said to improve the quality of the final constitutional product: elite discussions provide a “narrow focus,” while participation can “provide[] a space in which innovative solutions and approaches to problems can emerge that are qualitatively better than the solutions and approaches developed in elite or exclusive settings.”<sup>39</sup>

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35. In particular, Elster recognizes that excessive “publicity” of a constitutional assembly may obstruct a deal, because the public may not allow actors to make necessary compromises. *See* Elster, *supra* note 1, at 388–89.

36. *See* ACKERMAN, *supra* note 14, at 6–7, 287.

37. KIRSTI SAMUELS & VANESSA HAWKINS WYETH, STATE-BUILDING AND CONSTITUTIONAL DESIGN AFTER CONFLICT 3 (2006); *see also* Laurel E. Miller, *Designing Constitution-Making Processes Lessons from the Past, Questions for the Future*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 23, at 601, 636 (noting that the “case studies and thematic chapters on the whole regard public participation as valuable in terms of democratizing the constitution-making process,” although noting that some unanswered questions remain). *But see* Kirsti Samuels, *Constitution Building Processes and Democratization A Discussion of Twelve Case Studies* 27 (Int’l Inst. for Democracy & Electoral Assistance, Working Paper, 2005) (concluding that an important tradeoff to broader participation is that the “constitutions tend[] to threaten the established power structures, which [may react] by undermining the constitutions, amending them, preventing their adoption, or preventing their enforcement”).

38. *See* SAMUELS & WYETH, *supra* note 37, at 5.

39. Angela M. Banks, *Expanding Participation in Constitution Making Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043, 1050 (2008); *see also* Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT’L L. 663, 670 (2006) (“The use of more participatory and inclusive processes . . . to broaden the constitutional agenda and prevent the process from degenerating into a mere division of spoils between powerful players.”). In recent empirical work, Ginsburg, Elkins, and Blount find support for the idea that constitutions that include a referendum procedure requiring ratification by the public include more rights provisions overall. *See* Ginsburg et al., *supra* note 29, at 217–18.

Finally, participation in constitution-making is thought to improve the civic virtue of citizens by increasing their familiarity with and trust in governance.<sup>40</sup> Thomas Franck and Vivien Hart, in surveying state practice, have gone so far as to state that participation in constitution-making is an emerging norm of customary international law and indeed is virtually the only international norm governing the area.<sup>41</sup> The recommendation in favor of participation is particularly widespread in policy papers and in the work of analysts who are close to international organizations like the U.N.; thus, the norm in favor of participation has played a significant role in the actual practice of constitution-making, especially in the many countries where international bodies have played a significant role.<sup>42</sup>

I return to this point in Subpart III.C, arguing that if constitutional politics is viewed as ordinary politics rather than in the dualist mode, participation may in some cases appear as more of a hindrance than a help to the constitutional process. A high degree of popular participation within a poorly institutionalized environment may, as occurred in Bolivia, destabilize the constitutional process; the frequency of mass protests on both sides, and the ability of all actors to turn out their bases, may make it impossible for elites to reach agreement on key matters. This is particularly relevant for current constitution-making efforts in places like Egypt, facing similarly high degrees of mass mobilization.

### C. *An Agenda for the Second Best*

To a large extent, the classical theorists in the field, like Siey  s and Schmitt, are unconcerned with the practical implications of their theories. Their assertion instead is that there is a necessary logical relationship between constituted institutions (like legislatures) and constituting forces (the people): the latter must have the power to remake the former. The problem with this assertion is that a focus on logical or formal necessity should give way to a focus on the consequences of the argument. In other words, rather than focusing on whether the “people” must possess a power

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40. See, e.g., VIVIEN HART, U.S. INST. PEACE, SPECIAL REP. NO. 107: DEMOCRATIC CONSTITUTION MAKING 11 (2003), available at <http://www.usip.org/files/resources/sr107.pdf>.

41. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992); Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 23, at 3, 14 (“A survey of the practice of the international system in the application of treaty law and custom reveals no firm evidence of rules applicable to the process of constitution making. What does appear, however, is a general requirement of public participation in governance.”); Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair*, in FRAMING THE STATE IN TIMES OF TRANSITION, *supra* note 23, at 20, 42 (“‘Public affairs’ is now assumed to include the making of a nation’s constitution, and ‘taking part’ is an established right.”).

42. See, e.g., Hart, *supra* note 40; Samuels, *supra* note 39, at 665, 670.

to remake the state at any time, we should focus on the likely practical consequences of such a power. As I demonstrate below, such a power is likely to greatly increase the risk of destabilizing outcomes and worst-case scenarios.

However, modern theorists of the constitutional moment hypothesis, like Elster and Ackerman, do focus on consequences rather than logical necessity. It is simply that, as I argue here, they focus on the wrong likely outcomes of these processes. One might see the constitution-making model proposed by Elster and Ackerman as a first-best model. The goal is to include all groups in a deliberative moment, which will, in a relatively consensual manner, determine the future course of the polity. The call for participation by various scholars adds yet another dimension: the constitution-making moment will bring in actors who have traditionally been excluded from ordinary politics, and these actors will enrich the constitutional text and help to deepen the quality of the democracy. The resulting constitutional text will be transformative—it will not, of course, solve all of a country's problems, but it will set the country on a considerably better course than it was on previously. The South African constitution-making process is often held up as a model of first-best or transformative constitution-making.<sup>43</sup> Although the design of the process diverged in important ways from Elster's recommendations, the process and outcome in many ways resembled such a first-best model.<sup>44</sup> The process appears to have been genuinely deliberative and highly participatory, with participation having important impacts on the final text.<sup>45</sup> This has made the South African constitutional process (as well as the final text) a paragon for many constitutional theorists.

But the South African experience may have rested on conditions that will not always hold. Both of the major players were committed early on to a pacted democracy within relatively narrow limits—many major differences were taken off the table early, and there was a shared will about the type of system to create.<sup>46</sup> The constitution-making occurred under

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43. See, e.g., Heinz Klug, *Participating in the Design: Constitution-Making in South Africa*, 3 REV. CONST. STUD. 18 (1996) (arguing that South Africa represents an example of a successful constitution-making experience that was genuinely participatory); ARATO, *supra* note 34, at 59–97 (holding up the South Africa example as a potential model for Iraq).

44. In particular, the process in South Africa was what Arato calls “post-sovereign.” See ARATO, *supra* note 34, at 59–97. Rather than relying on an unconstrained constituent assembly, South Africa relied on a complex, highly constrained, two-stage process. In the first stage, parties agreed on a pacted, interim constitution. In the second stage, an elected parliament, doubling as a constituent assembly, wrote a permanent constitution subject to a set of principles agreed to in the interim draft. The Constitutional Court verified whether the final text complied with the principles in the interim draft. See *id.* at 72–86.

45. See Klug, *supra* note 43.

46. See, e.g., Cyril Ramaphosa, *Negotiating a New Nation: Reflections on the Development of South Africa's Constitution*, in THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH

favorable conditions of international pressure; other countries were able to put significant leverage on both sides to agree to a particular conception of constitutional democracy.<sup>47</sup> Finally, and probably most importantly, the country retained significant degrees of institutional capacity.<sup>48</sup> The judiciary and the rest of the state had significant capacity that was never destroyed.<sup>49</sup>

In other cases, there may be little prospect for genuinely transformative constitutionalism. In particular, states will often face the dilemma initially posed by Sam Huntington: a situation where political institutions have either broken down or are very weak and where the central challenge faced is the reorganization and reconstruction of these institutions.<sup>50</sup> Such a world faces a serious prospect of one of two worst-case outcomes: either the void in organization is not filled, leading to chaos and violence, or the void is filled by an outright authoritarian regime or by a competitive authoritarian regime led by a strongman or single-party system.<sup>51</sup>

The design of constitutional politics must often be aimed at avoiding these worst-case scenarios rather than in reaching best-case outcomes. In these cases, the central question in our theories of constitution-making is not how do we achieve a truly deliberative constitutional process so as to achieve a first-best, transformative outcome? It is instead: how do we manage to reach a second-best outcome in lieu of the two worst-case scenarios outlined above?<sup>52</sup> This second-best outcome is likely to be some variant of competitive democracy; a constitution written under such conditions is unlikely to be transformative in the South African sense, but it

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AFRICA'S BASIC LAW 71, 77–80 (Penelope Andrews & Stephen Ellmann eds., 2001) [hereinafter THE POST-APARTHEID CONSTITUTIONS] (explaining the course of the roundtable discussions).

47. See Klug, *supra* note 43, at 22–29 (noting the role of international actors in the South African transition).

48. See JENS MEIERHENRICH, THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652–2000, at 202 (2008) (explaining the importance of legal institutions and the rule of law in the transition from Apartheid).

49. *Id.* at 197–202, 277, 290–91.

50. See SAMUEL HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 1–10 (1968).

51. See *id.*; see also STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 56 (2010) (explaining how competitive authoritarian regimes have been a response to the breakdown of order in various regions after the end of the Cold War and how divergence in regime trajectory is largely explained by success in organizing power within the state and the party).

52. See, e.g., Matthew C. Stephenson, *Judicial Reform in Developing Economies: Constraints and Opportunities*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 2007: BEYOND TRANSITION 311, 320–25 (Francois Bourguignon & Boris Pleskovic eds., 2007) (describing and applying the theory of the “second best” to understand unintended consequences in judicial reform); see also Judith N. Shklar, *The Liberalism of Fear*, in POLITICAL THOUGHT AND POLITICAL THINKERS 3, 9 (Stanley Hoffmann ed., 1998) (arguing for a liberalism that is “less inclined to celebrate the blessings of liberty than to consider the dangers of tyranny”).

will at least avoid either a breakdown of order or an authoritarian or quasi-authoritarian regime.

This in turn suggests that an important goal of modern constitution-making should be to control unilateral or imposed exercises of power by particular groups or individuals. Experience across regions has shown that both strongmen and individual parties, unchecked by either institutions or other movements, will often take steps to consolidate their own power by weakening nascent democratic institutions.<sup>53</sup> These steps are sometimes taken in the text of the constitution, where strongmen, for example, create strong presidencies, but as I show in the case of Venezuela, they are also often undertaken via more informal means linked to reconfigurations of political power that surround the political process. Further, attempts to unilaterally impose constitutions on unwilling oppositions may create a near breakdown or total breakdown of order, as I show in the example of Bolivia below.

Thus, in the case studies that follow, I track the degrees to which unilateral political movements or individuals are restrained in their ambitions and are forced to compromise with other political forces. Internal diversity is important because, where no single political force or actor controls enough seats to unilaterally push through their program, actors must compromise with other political groups. External constraints, when a constitution-making body is subject to rules placed upon it by other institutions such as a court or ordinary legislative body, may also restrain unilateral exercises of power. Further, following the central concern with the topic in existing literature, I track the degree to which the process is participatory by trying to gauge the extent to which the general public and civil society are involved in shaping the process.

First, the case studies show that constitution-making is often dominated by the short-term political motives of the various groups involved rather than by longer term conceptions of public interest. In Venezuela, President Chávez undertook the constitutional process in order to be able to fatally weaken other political institutions (like the congress, the courts, and the subnational governments) that were still controlled by opposition groups. In Bolivia, both President Morales's Movimiento al Socialismo (MAS) movement and opposition parties sought to use the constitutional process in order to strengthen their political position with their base and to

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53. See, e.g., Partlett, *supra* note 29 (exploring cases in Russia, Belarus, and Kazakhstan); Muna Ndulo, *Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order*, in *FRAMING THE STATE IN TIMES OF TRANSITION*, *supra* note 23, at 176, 183–88 (explaining how those in power in Zimbabwe manipulated various constitution-making processes to serve their own ends); Allan R. Brewer-Carías, *The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the Development of an Authoritarian Political Regime*, in *FRAMING THE STATE IN TIMES OF TRANSITION*, *supra* note 23, at 505.



delegitimize the other side. Thus, although there was a widespread will for a new constitution in both cases, the agendas of constitution-making responded to the needs of the various parties, and in no case was there much of a real deliberation about the long-term public interest.

Further, the case studies demonstrate that the perils of constitution-making that I have outlined above are real. In Venezuela, it is clear that President Chávez took advantage of an assembly called in a weak institutional environment to set up a durable competitive authoritarian regime. And in Bolivia, it is equally clear that a highly participatory and polarized process regulated by a weakly defined set of rules exacerbated tensions and nearly caused the breakdown of the state. Like many acts of constitution-making in the developing world, these cases involved constitution-making under weakly institutionalized conditions. In such conditions, there are substantial threats of either disorder or of an imposed, non-democratic order. Bolivia is a clear example of a case where very high levels of participation in a poorly institutionalized environment hindered an agreement that could have otherwise been made and nearly caused the country to collapse into violence.<sup>54</sup> Since many countries write constitutions in similar conditions with a highly mobilized (and partisan) populace—like Egypt—the Bolivia example may be relevant as a warning to current constitution-making exercises.<sup>55</sup>

Finally, the results suggest that exercising control over constitution-making bodies is often difficult. In both cases, assemblies were not sufficiently internally diverse, so opposition forces tried to rely on external institutions to constrain them. But these constraints proved to be highly unstable: In Venezuela, judicially imposed limits on the constitutional assembly were ignored and eventually abandoned. In Bolivia, limits imposed by the ordinary Congress were violently contested, although they eventually held. Thus, while much existing work essentially assumes the efficacy of external constraints placed on constitution makers, the case studies suggest that these constraints will not prove to be credible in some cases, particularly when the constraining institution is a court.<sup>56</sup> I return to the need to find constraints on unilateral action, and the difficulty in finding such constraints, in Subpart IV.A below.

### III. CONSTITUTIONAL POLITICS GONE WRONG: TWO CASES

In this Part I look closely at two recent constitution-making processes from the Andes in Latin America: the Venezuelan constitutional process of

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54. See *infra* Subpart IV.C.

55. For a discussion of the Egyptian case in light of the studies carried out here, see *infra* Part IV.

56. See *infra* Subpart IV.A.

1999 and the Bolivian process of 2006 through 2009. These constitutional processes occurred under similar political conditions. In both cases, durable political regimes based on explicit, power-sharing pacts between traditional parties were disintegrating. These pacts were able to govern the two countries via stable (if restricted) democracy for long periods of time, but by the time in which new constitutions were being written, the exclusionary nature and/or pervasive corruption of these regimes had caused fatal crises of legitimacy and had severely undermined democratic institutions. In both cases, outsiders sought to circumvent and rebuild existing political institutions by calling constituent assemblies.

The two cases demonstrate two different dangers of modern constitutional politics. In one scenario, a powerful group or party uses its unilateral power over a constitution-making process to entrench an authoritarian or competitive authoritarian regime; this was the pathway taken in Venezuela. In a second scenario, constitution-making exacerbates conflicts between rival groups, leading to a breakdown in order; as very nearly occurred in Bolivia before a pacted constitution emerged as a partial solution. In both cases, the construction of the constitution-making process proved problematic. In Venezuela, the problem was that the insurgent movement faced no opposition inside the assembly and could not be constrained by external actors—this allowed the majority to use the assembly to marginalize the remaining pockets of opposition that existed within the state. In Bolivia, the insurgent movement again won a majority in the assembly, but here an opposition attempted to leverage institutions external to the assembly in order to force the majority to compromise. The result, particularly in an environment of high mass mobilization, was a chaotic struggle that nearly caused the breakdown of the state (although in the end, the parties reached a negotiated solution that probably reduced tensions).

#### A. *Venezuela (1999)*

Venezuela had, since 1958, been a pacted, two-party “partyarchy,” where two strong parties, Acción Democrática (AD) and Comité de Organización Política Electoral Independiente (COPEI), competed for power.<sup>57</sup> The system was competitive between these two parties but tended to restrict competition by any outside groups.<sup>58</sup> The two parties maintained

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57. See, e.g., STEVE ELLNER, *RETHINKING VENEZUELAN POLITICS: CLASS, CONFLICT, AND THE CHÁVEZ PHENOMENON* 51–87 (2008); Michael Coppedge, *Venezuela Popular Sovereignty Versus Liberal Democracy*, in *CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA* 165 (Jorge I. Domínguez & Michael Shifter eds., 2d ed. 2003).

58. See, e.g., ELLNER, *supra* note 57, at 53–55 (explaining how the “pacted” democracies in Venezuela and Colombia tended to exclude other movements, especially on the left).

their grip on power by being strongly linked to economic and social organizations like business associations and trade unions.<sup>59</sup> They also doled out patronage funds due to their grip on oil money.<sup>60</sup> But by the early 1990s, this system was in disarray due to a series of corruption scandals and economic crises, and the two parties had weakened considerably.<sup>61</sup> Hugo Chávez, who began his political career with an unsuccessful coup attempt against the old regime in 1992, took power in 1998 vowing to dismantle the old system.<sup>62</sup> He was able to take advantage of the population's near-universal desire for substantial changes to the political order.<sup>63</sup>

As explained in more detail below, Chávez was able to use his total control over the constitution-making process in 1999 to construct a competitive authoritarian regime, where elections continue to be held, but where Chávez's political movement has systematic advantages over the opposition (although he does not always win).<sup>64</sup> The puzzling aspect of Chávez's use of constitution-making, and of the role of constitution-making in competitive authoritarian regimes more generally, stems from Levitsky and Way's observation that these regimes tend to look, on paper, much like normal democracies—the advantages that they give to quasi-authoritarian incumbents derive from informal institutions and practices like bribery and ballot-stuffing.<sup>65</sup>

The text of the constitution was not irrelevant in the Venezuelan case: it did increase presidential power along a number of dimensions. Most

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59. See Coppedge, *supra* note 57, at 172 (stating that AD and COPEI were “broadly representative of society” and “extended their control to non-party organizations that they had politicized”).

60. See TERRY LYNN KARL, THE PARADOX OF PLenty: OIL BOOMS AND PETRO STATES 92–115 (1997) (explaining how the two-party regime built support using oil money).

61. See Coppedge, *supra* note 57, at 171–75; KARL, *supra* note 60, at 161–85.

62. See ELLNER, *supra* note 57, at 95–99 (explaining the background of the coup attempt); *id.* at 109–12 (explaining the ideology of the early part of Chávez's presidency, which focused on carrying out political change to the old system).

63. See, e.g., *id.* at 111.

64. Levitsky and Way define a competitive authoritarian regime as a “civilian regime[] in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents.” LEVITSKY & WAY, *supra* note 51, at 5. Regimes like the one in Venezuela, which lie somewhere between consolidated democracies and full-fledged authoritarian regimes, are inherently difficult to classify. Myers, for example, questions whether the Venezuelan regime should be considered a “delegative democracy”—a democratic regime with relatively fair elections but no real checks on presidential power—or an “electoral autocracy”—where some electoral competition is allowed but with a very unequal playing field. David J. Myers, *Venezuela: Delegative Democracy or Electoral Autocracy?*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 285, 292–93 (Jorge I. Domínguez & Michael Shifter eds., 3d ed. 2008).

65. See, e.g., LEVITSKY & WAY, *supra* note 51, at 27–28 (noting the “centrality of informal institutions,” such as vote-buying, electoral fraud, organized corruption, and privatized violence to competitive authoritarian regimes).

importantly, the old constitution would have limited Chávez to a single term in office, while the new one allowed him to run for two additional terms.<sup>66</sup> But the most striking fact about the Venezuelan process is that the assembly spent very little time debating the text and in fact wrote it in about three months. Most of its labor was spent instead on shutting down and packing other institutions like the legislature, judiciary, departmental and local councils, and labor unions. Members of the old AD and COPEI parties continued to dominate all of these bodies—certainly enough to block much of Chávez’s agenda.<sup>67</sup> Thus Chávez, who had initially won the election in 1998 with 56% of the vote,<sup>68</sup> was able to clean out the opposition, which made it much easier for him to consolidate power. The key role of the assembly, then, was not in writing a new text but in establishing total power over other institutions of state.

### 1. Process

In Venezuela, there were no effective constraints on Chávez’s movement. Chávez was able to unilaterally write the electoral rules that would govern the Assembly, and he selected a set of rules that brilliantly maximized his electoral representation and completely marginalized the opposition. Chávez’s movement won only 60% of the vote but took 95% of the seats, leaving the opposition with basically no voice.<sup>69</sup> Rather than using a proportional representation system that would have mapped votes

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66. See CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, 1999 art. 230. Members of the constituent assembly, of course, recognized the significance of this provision and wanted to ensure that Chávez would receive two additional terms. See *Gaceta Constituyente (Diario de Debates)*, *Noviembre 1999–Enero 2000*, No. 36, Nov. 4, 1999 (noting the understanding of an assembly member that Chávez’s two terms will run from the date on which the new constitution is enacted). There are other provisions that have emerged as problematic for democracy: for example, the clause that allows the assembly to delegate broad swaths of power to the executive. See, e.g., Myers, *supra* note 64, at 291 (recounting Chávez’s efforts to make full use of these powers following the 2007 election). But such clauses are not highly unusual in consolidated democracies.

67. These parties maintained a strong presence in the Congress even after the 1998 election. AD and COPEI together held 89 of the 188 seats in the lower house, and 46 of 100 seats in the Senate. When coupled with other parties that were friendly offshoots of these parties or otherwise opposed to Chávez, they held well more than 50% of both chambers, certainly enough to block much of Chávez’s agenda. Moreover, the judiciary was dominated by members of the two traditional parties, and Venezuela had long been a federal country, with many of the regional and departmental councils, governors, and mayors still in the hands of AD or COPEI leaders. Finally, AD and COPEI still controlled the major labor unions and business organizations, which had the potential to wreck economic havoc on the country. See Coppedge, *supra* note 57, at 179 tbl.8.5.

68. See *id.* at 174–75.

69. I do not mean to imply that the pro-Chávez forces were fully homogenous; as Ellner notes, there were “hard-line” and “soft-line” factions within his movement. See ELLNER, *supra* note 57, at 139–73; see also ROBERTO VICIANO PASTOR & RUBEN MARTINEZ DALMAU, *CAMBIO POLÍTICO Y PROCESO CONSTITUYENTE EN VENEZUELA, 1998–2000* [POLITICAL CHANGE AND CONSTITUTIONAL PROCESS IN VENEZUELA, 1998–2000] 161 (2001). This suggests that heterogeneity in a political movement is not a bar to an authoritarian or quasi-authoritarian outcome.

directly onto seats, Chávez used a majoritarian system with single-member districts, which tends to over-represent forces with majority support nationally.<sup>70</sup> The opposition was highly disorganized, often running no candidates for a given seat or running multiple candidates, thus splintering votes and compounding the effects of the majoritarian electoral system.<sup>71</sup>

Further, observers considered the debates to have been highly participatory. The referendum to convoke an assembly (which passed with more than 80% of votes in the affirmative), the elections for the Assembly, and the referendum approving the final text of the constitution (which passed with 72% of votes in the affirmative) all had high voter turnout compared to the turnout towards the end of the crumbling two-party system.<sup>72</sup> Moreover, during the assembly itself, the commissions received, considered, and in many cases incorporated changes proposed by civil society groups. As García-Guadilla notes, many civil society groups saw an opening due to the “loss of legitimacy by the traditional political parties,” and thus participated enthusiastically in and around the assembly, both by submitting proposals and by holding seminars, workshops, and other events aimed at debating proposals.<sup>73</sup> They also had some success at actually getting proposals accepted: García-Guadilla reports that these organizations submitted 624 proposals and had more than 50% accepted for inclusion in the constitutional text.<sup>74</sup> Further, groups stated that they were generally satisfied with the outcome, especially the more participatory model of democracy.<sup>75</sup> At the same time, however, Chávez’s influence on the constitution was overpowering—the final version closely resembled his initial proposal on most major points. Thus, civil society influence may have affected the details of the constitution but did not greatly shape its major structural outlines.<sup>76</sup>

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70. For a detailed discussion, see Renata Segura & Ana María Bejarano, *¿Ni una asamblea más sin nosotros! Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes*, 11 CONSTITUTIONS 217, 225, 228–30 (2004).

71. The two traditional parties won zero seats in the Assembly; the elected members of the opposition were basically independents. See Coppedge, *supra* note 57, at 179 tbl.8.5.

72. See *id.* at 178–79.

73. María Pilar García-Guadilla, *Civil Society Institutionalization, Fragmentation, Autonomy*, in VENEZUELAN POLITICS IN THE CHÁVEZ ERA: CLASS, POLARIZATION, & CONFLICT 179, 186 (Steve Ellner & Daniel Hellinger eds., 2003).

74. See *id.*

75. See *id.* (“Many of the organizations relegated to a low level of success indicated that nevertheless they were satisfied with the results obtained.”).

76. Viciano Pastor and Martínez Dalmau give some examples of debates that were heavily influenced by civil society. They note that the debate over the regulation of abortion was heavily influenced by both women’s groups and church organizations, and that the final text—which took a vague position on the legalization of abortion—was a result of victory by women’s organizations. Also, they note that civil society groups helped broaden the right to information. These influences on the text were obviously not unimportant but did not go to the basic structure of the state or to other fundamental issues. See PASTOR & DALMAU, *supra* note 69, at 167–69.

Since the Venezuelan assembly did not represent the opposition, and since mass participation was more window-dressing than real influence, the only prospects for effective control over the assembly came from external institutions. The Venezuelan Supreme Court attempted to use a complex set of doctrines to place limits on the assembly's actions, but these efforts failed. The vague nature of the doctrines, and more importantly the difficult political environment for the Court, made it impossible for it to effectively take a stand against the assembly's actions. The result is that the assembly was given free rein to dismantle other state institutions.

These attempts originated in a debate about whether a constituent assembly could be called by Chávez in the first place. The text of the constitution only contemplated constitutional amendment by the Congress and did not explicitly mention the possibility of a constituent assembly. A group of citizens asked the Political–Administrative Chamber of the Supreme Court to rule on whether Chávez could legally hold a referendum on whether to call elections for a constituent assembly within the existing legal order.<sup>77</sup> The Court, acting under considerable political pressure, held that the referendum could go ahead.<sup>78</sup> It distinguished between the “constituted” and “original constituent” powers, and defined the latter as “the primogenial power of the political community to give itself a judicial and constitutional organization.”<sup>79</sup> This fundamental organizational power could not be confused with the amendment power that was found textually in the constitution, because the “original constituent power” is “prior and superior to the established judicial regime.”<sup>80</sup> Thus, the Court held that the public retained an inherent power to affect fundamental constitutional change, regardless of limitations in the constitutional text.<sup>81</sup>

But the Court also attempted to place limits on this power. Opponents brought a subsequent challenge against the referendum questions Chávez had formulated.<sup>82</sup> The first question asked whether the voter wanted to convoke a National Constituent Assembly “with the aim of transforming the state and creating a new legal order that will permit the effective functioning of a social and participatory democracy.”<sup>83</sup> A second question asked whether the voter “authorized the President of the Republic to . . . fix . . . the bases of the electoral procedure in which the National

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77. See *Caso Junta Directiva de la Fundación para los Derechos Humanos* (Supreme Court of Justice, Political–Administrative Chamber), REVISTA DEL DERECHO PÚBLICO, nos. 77–80, 1999, at 56.

78. *Id.*

79. *Id.* at 65.

80. *Id.*

81. *Id.*

82. See *Caso Gerardo Blyde, contra la Resolución No. 990217–32* (Supreme Court of Justice, Political–Administrative Chamber), REVISTA DEL DERECHO PÚBLICO, nos. 77–80, 1999, at 73.

83. *Id.* at 78.

Constituent Assembly will be elected.”<sup>84</sup> Here, the Political–Administrative Chamber altered its jurisprudence, noting that “it is the existing constitution that permits [preservation of] the state of law and the [proceedings] of the National Constituent Assembly” and therefore that the Assembly was bound by the basic principles of the existing constitution.<sup>85</sup> Chief among these principles was the idea that the Assembly must represent “the true popular will.”<sup>86</sup> The Court held that the second question violated this principle and related ideas about “popular participation,” essentially because it forced voters to vote on an electoral procedure before the details of the procedure were established.<sup>87</sup> The vagueness of this initial ruling forced the court to issue a clarification explaining that the Assembly was “bound to the spirit of the Constitution in force, and therefore is limited by the fundamental principles of the Democratic State of Law.”<sup>88</sup>

With this opinion the Court wanted to establish some controls over the Assembly, perhaps in light of a concern that it would prove manipulable by Chávez. But the Court had great difficulty articulating principles that would limit him, and the constraints actually chosen were ineffectual: they forced Chávez to articulate the method of election for the Assembly before the referendum, which he did in a separate document alluded to in the referendum questions.<sup>89</sup> However, it did not force him to share authority in drafting the electoral rules or to adhere to particular substantive principles in doing so. Thus, as noted above, he was able to draft the rules unilaterally in a way that maximized support for his movement.<sup>90</sup>

Subsequent cases refined the principles set out in the initial decision but were no more effective in establishing any actual control. A subsequent case struck down a phrase included in the electoral rules that Chávez wrote, which defined the Assembly “as an original power that carries popular sovereignty.”<sup>91</sup> The Political–Administrative Chamber held that the phrase was in “frank contradiction” with the principle that the Assembly would be bound by the spirit and fundamental principles of the existing constitution.<sup>92</sup> And in yet another “interpretive” case the Chamber took

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84. *Id.*

85. *Id.* at 80.

86. *Id.* (“Stated in other words, one is attempting to obtain the clearest possible popular expression, the closest reflection to the will of the majorities, which doubtlessly implies the definition of those aspects related to the Assembly regime that is attempting to be installed.”).

87. *Id.* at 80–81.

88. *Caso Gerardo Blyde Perez, Clarification (Supreme Court of Justice, Political–Administrative Chamber)*, REVISTA DEL DERECHO PUBLICO, nos. 77–80, 1999, at 84.

89. *See* PASTOR & DALMAU, *supra* note 69, at 130–31.

90. *See supra* text accompanying note 69.

91. *See Caso Gerardo Blyde vs. Consejo Supremo Electoral (Supreme Court of Justice, Political–Administrative Chamber)*, REVISTA DEL DERECHO PUBLICO, nos. 77–80, 1999, at 85, 88.

92. *Id.* at 90.

note of statements President Chávez was making on television and radio, where he stated that the elections to the Assembly could not be controlled by the electoral laws currently in force because “the elections of the Constituent Assembly are not by mandate of the Constitution or of any law, they are by mandate of you, the people . . . .”<sup>93</sup> The Chamber stated that Chávez’s statements were incorrect because the elections of the Constituent Assembly would be carried out within the existing legal system, and thus were governed by “the entire current legal order . . . , the electoral rules approved by referendum . . . , the Constitution of the Republic, the Organic Law of Suffrage and Political Participation, and the other electoral norms . . . .”<sup>94</sup> The Court, however, while repeatedly reiterating these ideas, did not actually use its doctrine to mold the Assembly’s electoral procedures or other rules to any practical effect.<sup>95</sup>

Once the Assembly had been convoked, Chávez ignored the rulings of the Chamber and immediately declared it to have “original” powers. He stated in his opening address that the Assembly was “most sovereign” (“soberanisima”) and, in a symbolic political maneuver, immediately placed his own hold on the presidency at the disposition of the Assembly, stating that he served at its pleasure and would be forced to surrender the office if the Assembly so voted.<sup>96</sup> The somewhat bewildered members of

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93. See *Caso Alberto Franceschi y Otros* (Supreme Court of Justice, Political-Administrative Chamber), REVISTA DEL DERECHO PUBLICO, nos. 77-80, 1999, at 104, 104-106. Chávez was responding defiantly to an order of the National Electoral Council to desist from certain forms of television advertising that were considered illegal during political campaigns, arguing that the Council had no authority to regulate his actions. See *id.* at 105-06.

94. *Id.* at 109-10 (“The novelty—and, for this, extraordinary aspect—of the actual Venezuelan constituent assembly process is that it did not come about as a result of an event of fact (civil war, coup, revolution, etc.) but, on the contrary, was conceived as a ‘legal Constituent Process;’ in other words, a process marked within the actual Venezuelan judicial system.”).

95. For example, cases held that the electoral rules themselves, once approved by the people in the initial referendum, possessed “supreme validity.” The Political-Administrative Chamber therefore refused to strike down a provision of the rules that called for a “personalized” (or non-party list) method of election for the assembly, on the grounds that it would violate the right of suffrage of the substantial illiterate population of the country. See *Caso Cecilia Maria Colon de Gonzalez* (Supreme Court of Justice, Political-Administrative Chamber), REVISTA DEL DERECHO PUBLICO, nos. 77-80, 1999, at 90, 90-91. The petitioners reasoned that the requirement of “personalized” elections, in which a candidate would be identified only by name instead of by party symbol, would make it impossible for illiterate adults to cast a valid vote. See *id.* at 92. But the Court held that the claim was “inadmissible” now that the rules had been approved in referendum because they were a “decision of the electoral body, in exercise of its constituent power.” *Id.* And in a closely related case, the Court applied the electoral rules directly in striking down proposed regulations of the National Electoral Council that would have allowed the use of symbols in elections, holding that the Council was required to comply with the “personaliz[ed] vote” requirement in those rules. See *Caso Antonio Ramon Astudillo y otros* (Supreme Court of Justice, Political-Administrative Chamber), REVISTA DEL DERECHO PUBLICO, nos. 77-80, 1999, at 93, 101. Thus, the Chamber was unable to take a consistent position on whether it would use constitutional values and principles to control every phase of the Assembly process.

96. See HUGO CHÁVEZ FRÍAS, DOCUMENTOS FUNDAMENTALES DE LA REPUBLICA BOLIVARIANA DE VENEZUELA 7-61 (1999) (containing Chávez’s speech at the opening of the Assembly, where he



the Assembly debated the issue on August 9th and ratified Chávez as President with zero no votes and three abstentions;<sup>97</sup> he was resworn as President in front of the Assembly on August 11th, where he stated that “this act of today has that profound significance, that there remains no doubt to anyone that the Constituent Assembly is original and that all of the constituted powers will have to subordinate themselves not only to the word but to the concrete fact, before the sovereign mandates that emanate from here, before this center of light.”<sup>98</sup> The idea that the Assembly exercised original power was echoed by the elected president of the Assembly (who was part of Chávez’s party), Luis Miquilena, who, in his speech accepting the charge, declared the “original” and “sovereign” character of the Assembly.<sup>99</sup> The Assembly’s statute also stated that it “could limit or decide the cessation of the activities of the authorities that made up the public power.”<sup>100</sup>

Chávez’s maneuver was much more than symbolic: it was designed to enable him to weaken competing institutions over which his movement had less influence. On August 12th, the day after Chávez took the oath of office in front of the Assembly, the Assembly considered and approved a “national declaration of emergency,” “declaring the reorganization of all the organs of Public Power” and authorizing the Assembly to “take, execute, and order the measures dealing with the competence of the public powers of the State . . . that are necessary and indispensable to overcome the situation of emergency confronting the Nation . . . .”<sup>101</sup> The Assembly moved first against the judiciary—establishing on August 19th a committee of nine members selected by the Assembly and granting that body sweeping power to suspend or remove members of any court within the system, to select new judges, and to reorganize the structure of the judiciary.<sup>102</sup> The president of the Assembly noted that the Supreme Court

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referred to the Assembly repeatedly as “soberanisisimo”); *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 5, Aug. 9, 1999 [hereinafter *Gaceta Constituyente*, No. 5].

97. See *Gaceta Constituyente*, No. 5, *supra* note 96.

98. *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 6, Aug. 11, 1999.

99. *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 1, Aug. 3, 1999, at 2. Miquilena also stated that, “Our enemies continue being blinded, they try now to take refuge in a rejected judicial methodology that would take power away from the Constituent Assembly, that would try to make the Assembly a simple instrument to make a new constitution; in other words, they try to present to the country an insufficient Constituent Assembly, that would be incapable of having the sufficient sovereignty; the sacred cows of law are trying to invent the idea that this is a secondary and not original Constituent Assembly.” *Id.*

100. See *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 4, Aug. 7, 1999.

101. *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 7, Aug. 12, 1999 (considering the decree to reorganize the public powers).

102. *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 8, Aug. 17, 1999.

itself would be completely eliminated if it interfered with the Commission's work.<sup>103</sup>

When the Congress called itself into emergency session and began debating the appropriateness of those measures, the Assembly sharply limited the powers of Congress as well and discussed dissolving the Congress entirely.<sup>104</sup> It issued a decree suspending the functioning of the plenaries of the House and Senate and reducing Congress down to its Delegated Commission (which normally stayed in session during congressional recesses) and several other Committees.<sup>105</sup> It also approved a short list of activities that the Congress was allowed to work on, established that some of these actions were subject to ratification by the Assembly,<sup>106</sup> placed all other legislative powers in the Assembly itself, and established a Commission of Investigation charged with auditing the budgetary and other operations of the Congress.<sup>107</sup> Finally, the resolution similarly reduced all state legislative assemblies down to designated commissions composed of no more than seven members and decreed a list of matters on which even town councils were forbidden to take any action until further notice.<sup>108</sup> A subsequent resolution enacted August 30th reformed the first resolution by establishing that the Assembly itself would take over and constitute the Delegated Commission and other remaining commissions of Congress if the remaining congressional members failed to carry out their functions.<sup>109</sup>

These measures were challenged in front of the full Supreme Court by the leadership in the Congress, and this time the Court abandoned its efforts to control the Assembly.<sup>110</sup> The Court stated that the National Constituent Assembly is “not a derivative power” and thus “cannot be subject to the

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103. See *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 9, Aug. 19, 1999 (“Everything opposed to the decisions of the Constituent Commission will be eliminated. If the Supreme Court of Justice takes any measure—and it is likely that they will based on the tone with which they have been responding to some of our proposals—that in any way clashes with the decisions of the Commission, you are assured that by a unanimous vote their won’t be anybody here who will hesitate in eliminating the Supreme Court of Justice.”).

104. See *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 11, Aug. 25, 1999; see also PASTOR & DALMAU, *supra* note 69, at 150–51.

105. See PASTOR & DALMAU, *supra* note 69, at 150–51.

106. For example, the Commission was only empowered to pass legislation dealing with taxes, the budget, and telecommunications and issue extraordinary financial powers to the president after receiving the approval of the Assembly. See *id.* at 153 n.394.

107. See *id.* at 152.

108. See *id.* at 153.

109. See *Gaceta Constituyente (Diario de Debates)*, Agosto–Septiembre 1999, No. 14, Aug. 30, 1999.

110. See *Caso Vicepresidente del Congreso de la República vs. Asamblea (decreto 25-8-99)* (Supreme Court of Justice, Plenary Chamber), REVISTA DEL DERECHO PUBLICO, nos. 77–80, 1999, at 111.

limits of the existing judicial order, including the current Constitution.”<sup>111</sup> It also noted that the “convoking of the Colombian Constituent Assembly was preceded by a very broad consensus, in whose formation intervened the President of the Republic and the principal political forces, pushed by the initiatives of civil society.”<sup>112</sup>

This decision allowed the Assembly to take a series of actions that reshaped the entire state; in essence, the Court signed its own death warrant. The Commission charged with evaluating the entire judiciary removed a large number of judges and appointed their replacements.<sup>113</sup> The Congress, which had been effectively dissolved in August, was formally dissolved in December and was replaced by a National Legislative Commission chosen by the Constituent Assembly.<sup>114</sup> State legislative assemblies were likewise dissolved and replaced by five member commissions chosen by the Assembly.<sup>115</sup> Municipal councils and mayors were left intact but placed “under the supervision” of the Assembly and the National Legislative Commission, which was empowered to replace any of the current assemblymen or mayors at will.<sup>116</sup> The Supreme Court was replaced by a new Supreme Tribunal of Justice, which was staffed with a group of magistrates chosen by the Assembly.<sup>117</sup> Finally, the Assembly selected a new National Ombudsman (or Defensor del Pueblo) and Chief Prosecutor and chose new members of the National Electoral Council.<sup>118</sup> The Assembly also removed hostile mayors and created a National Commission of Unions that was charged with purging the leadership of the country’s labor unions, which was notoriously interlinked with the two traditional parties, AD and COPEI.<sup>119</sup>

Thus, the judiciary’s attempts to place limits on the Assembly failed. It is difficult to see how it could have succeeded. The courts could not have

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111. *Id.* at 119. The Court oddly held, however, that the Supreme Court still possessed the power to adjudicate controversies between organs of state, including the Constituent Assembly. *See id.*

112. *Id.* The dissenters, mostly from the Political–Administrative Chamber of the Court, sought to reiterate the Chamber’s doctrine that the Assembly was subject to constraints from the existing political order. *See id.* at 120–32 (dissenting opinions of Magistrates Harting, Rondon de Sanso, Ramirez Landaeta, Grisanti Luciani, and La Roche).

113. *See, e.g.,* Brewer-Carias, *supra* note 53, at 177–83.

114. *Gaceta Constituyente (Diario de Debates)*, *Noviembre 1999–Enero 2000*, No. 51, Dec. 22, 1999, at 3–4.

115. *See id.* at 4.

116. *See id.*

117. *See id.* at 4–5.

118. *See id.* at 6–7.

119. *See Gaceta Constituyente (Diario de Debates)*, *Noviembre 1999–Enero 2000*, No. 62, Jan. 30, 1999, at 6 (approving a decree to intervene in union elections); *see also* Steve Ellner, *Organized Labor and the Challenge of Chavismo*, in *VENEZUELAN POLITICS IN THE CHÁVEZ ERA*, *supra* note 73, at 161, 168–70 (explaining how the soft-liners within Chávez’s movement won an internal battle to try and alter the nature of existing unions rather than dissolving them and creating entirely new movements).

shut down the process entirely—the popular outcry for a new constitution was too great. But once they abandoned the formal limits in the constitutional text, they were left with a vague doctrine that was difficult to enforce. More importantly, the political environment made it almost impossible for the courts to oppose Chávez. The Supreme Court was a highly unpopular institution because of its link to the corruption of the old regime and both Chávez and the Assembly used rhetoric that tended to delegitimize the judiciary to great effect.<sup>120</sup>

## 2. Outcome

The lack of any effective constraint on Chávez during the Assembly allowed him to take control of the entire state and this in turn helped him construct a competitive authoritarian regime. The constitutional text is not really a “blueprint” for authoritarianism, although it does strengthen presidential power.<sup>121</sup> The problems instead have been the failure to carry out constitutional norms and informal practices that undermine democracy. For example, Chávez has relied upon “transitional” appointments to the judiciary to avoid the merit-based, careerist system found in the text.<sup>122</sup> These transitional judges lack security of tenure, making them removable at will by Chávez.<sup>123</sup> Moreover, Chávez’s measures aimed at stacking the deck in elections and at other times have generally gone unchecked because the members of the Supreme Court are closely affiliated with his regime.<sup>124</sup>

### B. Bolivia (2006–2009)

In Bolivia, as in Venezuela, a new constitution was written just after a pacted, consensus-based political system had broken down. Between the 1980s and 2005, Bolivia was ruled by coalitions of parties who held their pacts together with patronage and pursued a broadly neoliberal agenda.<sup>125</sup>

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120. ALLAN R. BREWER-CARÍAS, *DISMANTLING DEMOCRACY IN VENEZUELA: THE CHÁVEZ EXPERIMENT* 177–79 (2010).

121. *But see* Brewer-Carías, *supra* note 53, at 505, 518–22 (arguing that the text created a more centralized government and stronger president, which undermined democracy).

122. *See, e.g.,* Angel E. Alvarez, *State Reform Before and After Chávez’s Election*, in *VENEZUELAN POLITICS IN THE CHÁVEZ ERA*, *supra* note 73, at 147, 158–59.

123. *See, e.g., id.*

124. For example, the Supreme Court has often used doctrines suggesting that the constitutional regime has remained in a state of “transition” in order to allow actions like temporary judicial appointments that are not in accord with the new text. *See, e.g., id.*; *see also* BREWER-CARÍAS, *supra* note 120, at 226–44 (lamenting the lack of judicial independence of the new Supreme Tribunal of Justice).

125. *See generally* Eduardo A. Gamarra, *Bolivia Evo Morales and Democracy*, in *CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA*, *supra* note 64, at 124, 125–30. *See also* René Antonio Mayorga, *Bolivia’s Democracy at the Crossroads*, in *THE THIRD WAVE OF*

These parties were initially effective at providing stable growth but over time became increasingly plagued by corruption and increasingly incapable of carrying out fundamental reforms.<sup>126</sup> Like Chávez, President Morales rose to power at the head of a political movement, Movimiento al Socialismo (MAS), which promised to clean out these parties.<sup>127</sup> His movement also stood for strong opposition to neoliberal ideas like privatization and had a very different demographic background from the traditional parties.<sup>128</sup> For example, MAS has held itself out as representing the very large percentage of the population that identifies as indigenous, which felt marginalized from the mainstream political parties. The party thus offered the promise of new social inclusion.<sup>129</sup> One major difference between the Venezuelan and Bolivian case is that, in Venezuela, Chávez dominated his own personalist movement, and thus his party has had little autonomy. In Bolivia, in contrast, Morales is merely an important figure within a much more programmatic and powerful organization.<sup>130</sup>

Another major difference is that MAS faced an organized rather than inchoate opposition. In particular, Morales faced well-organized opposition from four departments located in the east of the country, together called the “half moon” because of their crescent shape.<sup>131</sup> These departments, centered on the city and department of Santa Cruz, are the economic engine of the country and the source of many of its natural resources like natural gas.<sup>132</sup> Further, they tend to have very different demographics from the mountainous departments near the capital of La Paz: they are relatively wealthy for Bolivia and considerably less indigenous.<sup>133</sup> Majorities in these provinces openly opposed Morales from the moment of his election; their

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DEMOCRATIZATION IN LATIN AMERICA: ADVANCES AND SETBACKS 149, 151–63 (Frances Hagopian & Scott P. Mainwaring eds., 2005) (explaining the nature of this regime).

126. See Gamarra, *supra* note 125, at 127 (stating that these parties “had suffered an enormous erosion of their appeal” because of a perception that they were “corrupt” and had sold off their resources, as well as “deepen[ed] inequality”); Mayorga, *supra* note 125, at 163–67.

127. See Gamarra, *supra* note 125, at 127.

128. Mayorga, *supra* note 125, at 175–76.

129. Figures differ as to the size of the indigenous population of Bolivia; the issue is sociologically complex. Donna Lee Van Cott estimates that about 65% of the population self-identifies as indigenous. See Donna Lee Van Cott, *Issues for Policymakers*, in *INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA* 1, 15 (Donna Lee Van Cott ed., 1994). But see Gamarra, *supra* note 125, at 132–33 (noting that studies have disagreed and the true figure may be closer to 10%–20%).

130. See, e.g., Santiago Anria, *Bolivia’s MAS Between Party and Movement*, in *LATIN AMERICA’S LEFT TURNS: POLITICS, POLICIES & TRAJECTORIES OF CHANGE* 101, 112–13, 121–22 (Maxwell A. Cameron & Eric Hershberg eds., 2010) [hereinafter *LATIN AMERICA’S LEFT TURNS*].

131. See Maxwell A. Cameron & Kenneth E. Sharpe, *Andean Left Turns: Constituent Power and Constitution Making*, in *LATIN AMERICA’S LEFT TURNS*, *supra* note 130, at 61, 71 (noting that the opposition had “material resources, institutional leverage, and electoral appeal”). Cameron and Sharpe also argue that Morales exists in a very different political culture than Chávez, which has made him more likely to respect the democratic rules of the game. See *id.* at 74.

132. See *id.*

133. See *id.* at 71.

chief demand was for greater regional autonomy and control over their own resources and other wealth.<sup>134</sup>

Morales took power demanding the holding of a constituent assembly in order to “refound” Bolivian democracy on a more socially inclusive basis.<sup>135</sup> This was an idea that was broadly supported by various political actors for different reasons.<sup>136</sup> Going back to 2003, most Bolivians had become convinced that a constituent assembly was necessary to solve the country’s problems.<sup>137</sup> In principle, the opposition around Santa Cruz supported the idea as well, because they saw it as a way to obtain greater regional autonomy.<sup>138</sup> The difficult question is whether there was any possibility of finding a constitution that would have succeeded in assuaging all of these various visions. The likely answer seems to be yes—while there were important differences between the groups, they all favored or accepted certain broad principles, like increasing the level of autonomy of the departments, allowing more expression and inclusion of indigenous communities, and reforming the land tenure system.<sup>139</sup>

### 1. Process

That it was almost impossible for such a compromise to emerge was due in large part to the details of the constitutional process, which can properly be described as “messy and irregular”<sup>140</sup> and which very nearly became a full-fledged “constitutional breakdown.”<sup>141</sup> First, as we will see, internal to the Assembly MAS and related parties won a substantial majority of seats—the opposition was placed in a weak position although it was not completely marginalized as in Venezuela. The opposition tried to make up for this deficiency by using other institutions—the Congress and the courts, particularly—to assert substantial oversight over the Assembly. Finally, levels of participation were extraordinarily high—the public on both sides was deeply invested in the event, and thus both sides were able

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134. The region of Santa Cruz had already, in 2005, passed a regional referendum by a large margin calling for greater autonomy. Kent Eaton, *Backlash in Bolivia: Regional Autonomy as a Reaction Against Indigenous Mobilization*, 35 POL. & SOC’Y 71, 84 (2007).

135. See Gamarra, *supra* note 125, at 129.

136. See *id.* at 139 (finding in focus groups that citizens had “high expectations” for the Assembly’s success).

137. See *id.* at 138.

138. See *id.* (noting that members of the half-moon departments “hoped that a constituent assembly would end the debate about centralization and its alleged limit on the development of the country’s key regions”).

139. See, e.g., Franz Xavier Barrios Suvelza, *Autonomías Indígenas*, in CONTRAPUNTOS AL DEBATE CONSTITUYENTE 69 (Horst Grebe Lopez et al., 2007) (describing points of coincidence on the issue of how to treat indigenous communities).

140. Cameron & Sharpe, *supra* note 131, at 73.

141. Fabrice Lehoucq, *Bolivia’s Constitutional Breakdown*, 19 J. DEMOCRACY 110 (2008).

to muster large groupings of citizens for marches or demonstrations. The combination of all this, as we will see below, was a recipe for an extremely chaotic process. In the absence of any fixed rules of the game, the external limits on the Assembly proved highly contested, and the further ability of both sides to mobilize their publics exacerbated social and regional divides during the Assembly. But in the end, the external limits on the Assembly did hold, and the final constitution was negotiated between MAS and the opposition rather than being imposed as in Venezuela.

The previous president, under pressure from MAS, had in 2004 pushed through Congress a constitutional amendment allowing the convoking of a constituent assembly.<sup>142</sup> Thus, unlike in Venezuela, in Bolivia the holding of an assembly was explicitly contemplated and regulated by the old constitution. The provision stated that the “total reform” of the constitution would be the power of a constituent assembly, which would be convoked by a “special law” approved by two-thirds of the members of the Congress, and which could not be vetoed by the president.<sup>143</sup> This simple provision placed significant constraints on Morales, because it ruled out a strategy of making an end-run around Congress, as Chávez had done, and forced him to negotiate with the opposition in Congress.<sup>144</sup> The opposition generally shared Morales’s desire for a new constitution, but were concerned that he would dominate the process and ignore their concern for greater regional autonomy.<sup>145</sup>

The two sides successfully negotiated and approved, in March 2006, a special law to convoke the Assembly, which placed significant external constraints on the process.<sup>146</sup> First, the electoral rules were designed to ensure substantial representation for minority political forces—they were far less majoritarian than Chávez’s electoral rules had been in Venezuela.<sup>147</sup>

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142. See Ley No. 2631, Feb. 20, 2004, available at <http://www.lexivox.org/norms/BO-L-2631.xhtml>.

143. See *id.* art. 232 (“The total reform of the Constitution is a private power of the Constitutional Assembly, which will be convoked by a Special Law of convocation approved by two-thirds of the vote of the members present in the national Congress and cannot be vetoed by the President of the Republic.”).

144. Morales held 72 of 130 seats in the House but only 12 of 27 seats in the Senate. See JEFFERY R. WEBBER, FROM REBELLION TO REFORM IN BOLIVIA: CLASS STRUGGLE, INDIGENOUS LIBERATION, AND THE POLITICS OF EVO MORALES 55 tbl.2.3.

145. See, e.g., *Podemos y MNR acusan a MAS de querer hegemonizar la Asamblea*, LOS TIEMPOS, Mar. 18, 2006, available at [http://www.lostiempos.com/diario/actualidad/nacional/20060318/podemos-y-mnr-acusan-a-mas-de-querer-hegemonizar-la\\_5745\\_5745.html](http://www.lostiempos.com/diario/actualidad/nacional/20060318/podemos-y-mnr-acusan-a-mas-de-querer-hegemonizar-la_5745_5745.html) (noting the opposition’s fear that Morales’s movements would find ways to dominate the elections to the assembly).

146. See Ley 3364, Mar. 6, 2006, available at <http://www.lexivox.org/norms/BO-L-3364.xhtml>.

147. Two hundred ten of the 255 members were selected in 70 local districts with a district magnitude of three. Two seats would go to the movement receiving the plurality of votes, and one would go to the second-place movement or party. See *id.* art. 14. The remaining 45 members were selected at the departmental level, with each department receiving five members, regardless of the size of that department. See *id.* Further, the parties and movements were allowed to form alliances at the

Second, the rules proposed that the constitution would be drafted in the city of Sucre, which was considered a relatively neutral site between Morales supporters in La Paz and opposition supporters in Santa Cruz.<sup>148</sup> Third, the law provided that the Assembly “will approve the text of the new constitution with two-thirds of the members present,” and that once so approved the text would be put to the people in a referendum convoked by the executive, which would require approval by an absolute majority of votes.<sup>149</sup> Finally, the Assembly was given one year in which to complete its task.<sup>150</sup> In mid-2007, when the Assembly was unable to complete its work on time, the Congress reformed the law, extending the Assembly’s mandate until December 2007 but also making it clear that only the Congress (rather than the executive) had the authority to convoke the referendum needed to approve the Assembly’s draft constitution, by a law receiving two-thirds approval.<sup>151</sup> In general, the rules seemed designed to ensure that neither group could steamroll the other and impose a constitution.<sup>152</sup> Further, the revised law gave the Congress a sort of last word by giving it the power to call the approval referendum.<sup>153</sup>

The electoral rules functioned about as expected. In elections in July, Morales’s MAS won a majority of seats, but the opposition, led by Podemos, won more than the one-third necessary to block an imposed constitution.<sup>154</sup> The structure set up to externally control the Assembly, however, never functioned in a stable manner: MAS consistently attacked the legitimacy of these constraints. Even before the Assembly had been sworn in, Morales and members of MAS floated the possibility that it would exercise “original constituent power.” Morales, for example, stated that the Assembly “must be above all of the constituted powers, but submitted to the social movements because it was those movements that

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local or departmental level, thus allowing both Morales’ allies and the opposition to form unified lists when desired. *See id.* art. 19.

148. *See id.* art. 6.

149. *See id.* arts. 25–26.

150. *See id.* art. 24 (stating that the duration of the assembly must be between six months and one year).

151. *See* Ley 3728, Aug. 4, 2007, arts. 1, 4, *available at* <http://www.lexivox.org/norms/BO-L-3728.xhtml> (“The Congress of the Republic will convoke, by a Law of the Republic, approved by two-thirds of the members present, the Referendum with binding character . . .”). The original version of the law stated clearly that the executive had power to call the referendum. *See* Ley 3364, *supra* note 146, art. 26 (“Once the mission of the Constituent Assembly has concluded, the Executive Power will convoke the Constituent Referendum . . .”).

152. *See* Cameron & Sharpe, *supra* note 131, at 72–74. The rules also permitted a referendum on departmental autonomy to be held concurrently with the election of the assembly. While the referendum failed nationally, it carried by a large margin in the half-moon region. *See* Lehoucq, *supra* note 141, at 117–18.

153. *See* Ley 3728, *supra* note 151, art. 4.

154. The MAS won 50.9% of the vote and 54% of the seats, while Podemos won 24% of the seats. *See* Lehoucq, *supra* note 141, at 117.



gave them life.”<sup>155</sup> Morales also called for the large-scale mobilization of indigenous groups and other social movements on Sucre during the Assembly, and organized a march of thousands of people which coincided with the weekend before its opening.<sup>156</sup>

This general debate about the character of the Assembly fed into a more practical debate about what the two-thirds rule would mean—whether it required two-thirds approval of all articles individually or simply of the final text.<sup>157</sup> MAS favored the latter position, while Podemos and other opposition parties fought for the former.<sup>158</sup> This issue paralyzed the Assembly for about six months (at times preventing sessions from meeting due to a hunger strike carried out by female members of the Assembly), until the two sides were able to reach a compromise in February 2007.<sup>159</sup> The issue was marked by massive demonstrations on both sides. For example, in early December the “half moon” departments called a general strike, and MAS-related social movements responded with huge marches on Sucre.<sup>160</sup> Finally, in February the two sides compromised, agreeing to use a two-thirds rule for approval of all constitutional articles until July 2.<sup>161</sup>

Once this issue had finally been settled, the two sides began working on the text in committee. The work of the committees showed that, while there were serious divisions, there was some possibility of overcoming them. There were difficult areas where the commissions were working towards consensus—for example there was broad agreement on increasing the autonomy both of the departments and of indigenous groups, although

155. *Asamblea originaria genera contradicción en el Gobierno*, LA PRENSA, July 28, 2006, available at <http://constituyentesoberana.org/info/?q=node/341>; see also *El MAS planteará poderes absolutos en la Asamblea*, AGENCIA DE NOTICIAS FIDES, Aug. 17, 2006, available at <http://constituyentesoberana.org/info/?q=node/463> (quoting a minister in the Morales administration as saying that the Assembly was not limited by the previous Constitution and that the Bolivian people—not Congress—convoked the assembly).

156. See Carlos Morales Peña, *MAS to Mobilise 100,000 People to Sucre*, LA PRENSA, Aug. 26, 2007, available at <http://boliviarising.blogspot.com/2007/08/mas-to-mobilise-100000-people-to-sucre.html>; *El Poder Ejecutivo organiza la presión sindical a la Asamblea*, LA RAZON (La Paz), Aug. 12, 2006, available at <http://constituyentesoberana.org/info/?q=node/435> (quoting a labor leader as saying that “we are going to ensure that all of the proposals presented by the social sector are taken into account”).

157. Lehoucq, *supra* note 141, at 118.

158. *Id.*

159. *Id.*

160. See, e.g., *Presidente lamenta convocatoria a paro*, EL DIARIO, Dec. 1, 2006, available at <http://constituyentesoberana.org/info/?q=argumento-civicos> (explaining the opposition’s call for a regional strike and the president’s reaction to that call).

161. The two sides also agreed to debate both the majority and minority reports from the Assembly’s commissions, and to settle those questions where consensus could not be reached via referendum. See *Constituyente logra, en consenso, reformar su sistema de votación*, GRUPO LIDER, Feb. 15, 2007, available at [http://www.derechoshumanosbolivia.org/noticia.php?cod\\_noticia=NT20070215103647](http://www.derechoshumanosbolivia.org/noticia.php?cod_noticia=NT20070215103647).

there were still important disagreements at the level of detail.<sup>162</sup> Still, even at this stage, popular movements and demonstrations were common and problematic for the Assembly—when it sat in Santa Cruz in April as part of a national tour, several members were physically attacked, and there were huge demonstrations by student groups and mining unions against specific proposals in the Committees.<sup>163</sup>

Negotiations broke down completely in August 2007 over a peripheral issue, after some members proposed that the capital of the country, and all of its attendant functions, be moved from La Paz to Sucre.<sup>164</sup> When members of the MAS passed, by a simple majority, a motion tabling the proposal, the reaction in Sucre was catastrophic.<sup>165</sup> The city experienced an outpouring of violent uprisings which made it impossible for the Assembly to even meet during the late summer and fall.<sup>166</sup> The protests were base-led rather than elite-led; the opposition did not consider the issue important and

162. See, e.g., *Análisis de Comisiones toman forma en la Asamblea Constituyente*, GRUPO LIDER, Mar. 14, 2007, available at [http://www.constituyentesoberana.org/3/noticias/ac/mar2007/140307\\_1.html](http://www.constituyentesoberana.org/3/noticias/ac/mar2007/140307_1.html) (noting agreements and areas of divergence in the commission charged with defining autonomy in the new constitution); *Concluyo el Taller convocado por la Asamblea Constituyente*, GRUPO LIDER, Mar. 14, 2007 (finding broad agreement in favor of legal pluralism or the idea that indigenous groups should be able to use their own law in many cases); *Panorama de consensos y disensos*, EL DEBER, April 8, 2007, available at [http://constituyentesoberana.org/3/noticias/ac/abril2007/080407\\_1.html](http://constituyentesoberana.org/3/noticias/ac/abril2007/080407_1.html) (noting some agreements on both land policy and autonomy); *Comisión de Autonomías busca redactar informe único*, EL DIARIO, June 5, 2007, available at [http://www.constituyentesoberana.org/3/noticias/ac/jun2007/060607\\_1.html](http://www.constituyentesoberana.org/3/noticias/ac/jun2007/060607_1.html) (stating that the members of the Commission on Autonomy were fairly close to being able to present one unified report to the Plenary). Even during this phase, however, the role of popular participation was problematic. See *Por segundo día exaltados arremeten en contra de asambleístas y obligan a suspender sesiones*, ABI, Apr. 3, 2007, available at [http://constituyentesoberana.org/3/noticias/ac/abril2007/040407\\_1.html](http://constituyentesoberana.org/3/noticias/ac/abril2007/040407_1.html).

163. See *Por segundo día*, *supra* note 162 (physical violence against members of the assembly); *Mineros y estudiantes protestan contra la Asamblea Constituyente en Bolivia*, AGENCE FRANCE PRESSE, June 15, 2007, available at <http://archivo.abc.com.py/2007-06-16/articulos/336825/mineros-y-estudiantes-protestan-en-bolivia>. Also, officials from the four departments of the “Half Moon” met in Tarija, declared themselves in a “state of emergency,” and emphasized that they would not comply with the new constitution if it did not meet their demands for autonomy. See *Tras pronunciamiento de autoridades y cívicos de cuatro regiones Acusan a la “media luna” de buscar fracaso de la Asamblea*, EL DIARIO, June 1, 2007, available at [http://constituyentesoberana.org/3/noticias/ac/jun2007/010607\\_1.html](http://constituyentesoberana.org/3/noticias/ac/jun2007/010607_1.html).

164. Bolivia has historically had a complex situation with a joint capital; the executive and legislative branches sat in La Paz, while the judiciary sat in Santa Cruz. The proposal was to move all functions of government to Sucre.

165. See *El MAS asegura que el retiro de la capitalidad de la Constituyente fue un acto legal*, ABI, Aug. 16, 2007, available at <http://www.constituyentesoberana.org/info/?q=articulo-22>. Initially, much of the opposition (including parts of Podemos) supported this measure, because it saw it as a distraction from larger issues. See *Eliminación del tema capitalidad del debate en la Asamblea Constituyente divide a Podemos*, ABI, Aug. 16, 2007, available at <http://www.constituyentesoberana.org/info/?q=division-podemos>. Thus, this was not really a case of the leadership mobilizing the people; rather, the public in Sucre mobilized and changed the position of the opposition in a way that made it more intransigent.

166. See, e.g., *Continúa en riesgo la Constituyente y aún no aparece propuesta de solución para destruirla*, ABI, Sept. 25, 2007, available at <http://comitedeapoyoabolivia.blogspot.com/2007/09/continua-en-riesgo-la-constituyente-y.html>.

most did not even favor moving the capital, but they embraced these protests once they became significant in size.<sup>167</sup> In November, after failed negotiation attempts, the President of the Assembly convoked the Assembly in a military compound in Sucre in order to approve the text; the opposition however did not participate and labeled the actions illegal and “written with rifles and bayonets.”<sup>168</sup> Large-scale riots in Sucre caused three deaths and about 200 injuries.<sup>169</sup> Later the Assembly was moved to Oruro, a city near La Paz, and the final text was approved while social movements encircled the building and prevented the entrance of the opposition.<sup>170</sup>

However, the negotiated external constraints gave the opposition a potential trump card: under the modified text of the law convoking the Assembly, Congress was charged with passing a bill calling the referendum which would approve the Assembly’s work, and the opposition had enough votes to block Congress from reaching the two-thirds necessary to pass such a law.<sup>171</sup> These constraints again were contested. In February 2008, civil organizations close to Morales staged massive demonstrations, effectively preventing the opposition from reaching the floor, and allowing the majority to reach the requisite two-thirds to call the referendum.<sup>172</sup> After huge uprisings by groups around Santa Cruz, the referendum was suspended by the Electoral Court on vague and technical grounds, and sent back to the Congress again.<sup>173</sup> The Electoral Court was the opposition’s

167. *Id.*

168. *See Bolivia saqueos y muerte en Sucre en protesta contra Asamblea Constituyente*, AGENCE FRANCE PRESSE, Nov. 25, 2007, available at [http://afp.google.com/article/ALeqM5j5oknSy3qV TX5Q9\\_f6tDciTfflxA](http://afp.google.com/article/ALeqM5j5oknSy3qV TX5Q9_f6tDciTfflxA).

169. *See id.*

170. *See* SALVADOR SCHAVALZON, *EL PROCESO CONSTITUYENTE EN BOLIVIA (2006–2009): ENTRE EL ACUERDO MODERADO Y LA RUPTURA REVOLUCIONARIA* 5 (2010). This was done after MAS secured in Congress a law that altered the special law of convocation to allow the Assembly to meet anywhere in the country, instead of just in Sucre. *See* Ley No. 3792, Nov. 28, 2007, available at <http://www.lexivox.org/norms/BO-L-3792.html>.

171. *See* SCHAVALZON, *supra* note 170, at 6. The opposition claimed the approval by the Assembly was illegal—in particular they looked at a provision of the reformed special law of convocation that required a two-thirds majority of “the members of the Constituent Assembly” (the original text had required two-thirds approval of “those present.”) *See id.* at 5–6 n.5.

172. *See* Lehoucq, *supra* note 141, at 118; *see also* Ley No. 3836, Feb. 29, 2008, available at <http://www.lexivox.org/norms/BO-L-3836.xhtml>. Because the earlier version of the law did not allow a referendum both deciding between conflicting versions of the text and determining approval of the constitution as a whole at the same time, Congress also amended the convocation law yet again. *See* Ley No. 3837, Feb. 29, 2007, available at <http://www.lexivox.org/norms/BO-L-3837.xhtml>.

173. *See* Resolución No. 013/2008, Mar. 7, 2008 (National Electoral Court). The Court specifically held that the Congress had illegally held a referendum on deciding between conflicting constitutional provisions (where there was disagreement between majority and minority) together with a referendum on deciding the constitutionality of the Constitution as a whole, and that it had modified the special law convoking the assembly to allow the two referendums to be held together only just after it had approved the referendum itself. *See id.*

only real option because the other judicial institutions had effectively been neutralized. The Constitutional Court, for example, had been left without a quorum because five of the remaining magistrates had resigned after MAS members of the Congress started impeachment proceedings against them.<sup>174</sup>

Observers responding to this stage of the process saw the Assembly as a highly destabilizing force in Bolivian politics. They noted that it greatly increased regional tensions and was viewed by the citizenry as a “collective farce.”<sup>175</sup> They also viewed the “very future of the country [as] seriously at stake” and saw a civil war or at least significant armed confrontation as the likely result.<sup>176</sup>

Yet the MAS did not make further attempts to ignore or marginalize the constraints placed on the Assembly; instead, the two sides reached an agreement behind closed doors in October 2008. The Congress agreed to call a referendum on a constitutional text that had been modified in important ways.<sup>177</sup> In particular, MAS made important concessions that increased regional autonomy and decreased the statist nature of the economy.<sup>178</sup> The referendum was approved in January with 61% of the vote in favor and 39% opposed.<sup>179</sup>

The process in Bolivia highlights several key points. The first is that the significant external constraints on the Assembly did affect the outcome—they reinforced the power of the opposition and allowed it to extract concessions throughout the process. But they also proved highly unstable—throughout the process, members of the MAS majority threatened to ignore these constraints because of the Assembly’s “original” character, which placed it above other political institutions. This instability was made much worse by the incredible levels of popular involvement on both sides. Podemos and MAS were both able to rally large numbers of people on cue, effectively turning Sucre into a war zone. This kind of mobilization eventually fractured the Assembly over a relatively unimportant issue (the location of the capital) and probably prevented the two sides from reaching what would have been a possible agreement on broad issues. The result was a near breakdown of order, although one that was avoided at the last minute by a compromise between rival groups.

174. See Lahoucq, *supra* note 141, at 119–20.

175. See Gamarra, *supra* note 125, at 139.

176. See *id.* at 149–50; see also Lahoucq, *supra* note 141, at 122 (“Unless more moderate factions in both camps can fashion an institutional compromise that satisfies each side’s hardliners, violence will settle what is turning out to be a conflict of epic proportions in the central Andes.”)

177. See *Bolivian Reforms Deal Reached*, BBC (Oct. 21, 2008, 9:06 GMT), <http://news.bbc.co.uk/2/hi/7681413.stm>.

178. For a detailed comparison of the modifications to the text carried out by Congress, see Silvia Raquel Mejía L., *Análisis comparativo de los textos de la nueva Constitución Política del Estado* (2009), available at [http://constituyentesoberana.org/3/noticias/ac/112008/051108\\_1.pdf](http://constituyentesoberana.org/3/noticias/ac/112008/051108_1.pdf).

179. See, e.g., SCHAVALZON, *supra* note 170, at 1.

## 2. Outcome

Experts in the aftermath of the Bolivian constitution-making process were unclear what exactly to make of the final product. Some felt that MAS had made major concessions, while others felt that Morales had won on most of the major points.<sup>180</sup> The text was praised by many actors for representing a novel synthesis of ideas, particularly in the incorporation of indigenous groups and in constructing a multicultural state.<sup>181</sup> But the major effects of the constituent assembly, again, were probably not in the text. During the constitutional process itself, there can be little doubt that the Constituent Assembly made things much worse by heightening tensions on both sides—the chaotic fights to control the Assembly, coupled with the high levels of participation, made the differences between the half-moon region and Morales’ supporters even more salient. In 2008, the departments located in the half-moon part of the country held referendums on new autonomy statutes that asserted very high (and unconstitutional) levels of power for their regions; these statutes were approved in regional referenda by large margins.<sup>182</sup>

Once the agreement occurred, however, it appears to have had a calming effect. Politically, the agreement helped to unify the country and to reduce regional tensions. Morales, for example, won a far higher percentage of the vote in the half-moon region in 2009 than he had initially in 2005.<sup>183</sup> Moreover, the process appears to have taught Morales and his supporters a considerable amount about governing—the tortured process of getting the new constitution approved helped MAS evolve from a radical opposition movement that was accustomed to protesting on the streets to a more reformist movement that was willing to cut meaningful deals with the opposition.<sup>184</sup>

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180. *Compare Nueva Carta Magna, cambiada por el Congreso, más blanda con los grandes propietarios de tierras*, BOLPRESS, Oct. 24, 2008, available at [http://constituyentesoberana.org/3/noticias/tierra/102008/241008\\_3.html](http://constituyentesoberana.org/3/noticias/tierra/102008/241008_3.html) (arguing that the constitution had greatly weakened MAS’s proposals), with *Referendo constitucional en Bolivia fortalece a Morales, fractura oposición*, AGENCE FRANCE PRESSE, Feb. 6, 2009, available at <http://www.tribunalatina.com/es/viewer.php?IDN=15119> (arguing that the overall process had greatly aided Morales by splitting the opposition between moderate and more extreme components).

181. See Cameron & Sharpe, *supra* note 131, at 72–73.

182. See George Gray Molina, *The Challenge of Progressive Change Under Evo Morales*, in LEFTIST GOVERNMENTS IN LATIN AMERICA: SUCCESSES AND SHORTCOMINGS 63 (Kurt Weyland et al. eds., 2010) (noting that the autonomy statutes “reverse[ed] the areas of national and departmental responsibility in almost mirror fashion” and “demonstrat[ed] a radical disagreement over autonomies and decentralization of the state”).

183. He won 41% of the vote in the half-moon heartland of Santa Cruz in 2009, up from 33% in 2005. See JEFFERY R. WEBBER, FROM REBELLION TO REFORM IN BOLIVIA: CLASS STRUGGLE, INDIGENOUS LIBERATION, AND THE POLITICS OF EVO MORALES (2011).

184. Cf. *id.* (arguing that Morales’s movement had become much more moderate and conciliatory through time, but attributing this to changes in the leadership of the movement).

## IV. IMPLICATIONS

The constitution-making processes surveyed above were about short-term, ordinary politics. Rather than being moments where politicians rose above ordinary political interests, both of the Assemblies here were used by political forces as alternative ways to carry out their political goals. Moreover, politicians used ideas about “constituent power” and appeals to “the people” as a mask for their short-term goals. They abused the rhetoric and instruments of constitutional politics—assemblies, plebiscites, mass participation—to achieve particular political goals. In reality, these Assemblies did not represent all of the people, nor were they moments where political communities defined their fundamental identities or engaged in particularly high levels of deliberation. They were political instruments, like other political institutions, that were used for political purposes and that served the interests of particular political groups. In Venezuela, forces around Chávez saw the Assembly as a way to quickly clean out hostile institutions that were still staffed with the traditional parties hostile to Chávez. In Bolivia, both MAS and its opponents saw the Constitutional Assembly as a way to gain political leverage on the other side. This point is important for the design of constitution-making processes: it suggests that the main goal in many cases should be to control exercises of power under difficult conditions, rather than to somehow shepherd politics into a second, higher-politics track. And it suggests that constitutional politics can be both destabilizing and dangerous, allowing particular individuals or groups to threaten democratic order in seemingly legitimate ways.

Further, the case studies show that constitution-making, which often occurs when political institutions are very weak and contested, can raise a threat of one of two unfavorable outcomes. First, strongmen or strong parties might unilaterally impose an authoritarian or only weakly democratic regime, as occurred in Venezuela. Other scholars have found similar evidence in other regions: Partlett, drawing upon transitions in Eastern Europe and former Soviet republics in Asia, shows how powerful strongmen in that region tended to use constitution-making to entrench themselves in power and to create similar competitive authoritarian or weakly democratic regimes.<sup>185</sup> Second, constitutions imposed by one group on another might cause the breakdown of order in the state, as very nearly happened in Bolivia. The case studies thus support the view that control over unilateral exercises of power should be a central—if not the central—purpose of design of the process

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185. See Partlett, *supra* note 29.

Finally, while recent work has focused on the risk that a single charismatic individual, normally a president or similar figure, will manipulate the process to produce an undemocratic constitution,<sup>186</sup> single parties as well as powerful individuals can be a threat to democracy. The contrast between Bolivia and Venezuela is instructive. In Venezuela, Chávez dominated his movement and was able to bend it to fit his personal ambitions. In Bolivia, Morales was in a different position—he was the leader of MAS, but he was highly constrained by forces within his party.<sup>187</sup> Still, the MAS effort to impose a constitution proved deeply problematic for Bolivian democracy. Many of the most durable and effective authoritarian regimes historically have been single-party states that were not highly personalist in nature; the high degree of institutionalization of the party has actually helped the regime survive the death or fall in popularity of a single figure.<sup>188</sup> This suggests that unilateral exercises of power of any kind can be a threat to competitive democracy.

In this Part, I raise several implications based on the findings from the case studies. While the case studies show that there is a need to control majoritarian political forces during constitution-making processes, they also show that this can be very challenging to achieve. A line of important theoretical work in political science argues that politics is fundamentally about institutionalization and organization: politics is most successful at channeling conflict when strong institutions mediate political groupings and interests.<sup>189</sup> Constitution-making tends to occur when such institutions are either weak or absent, and moreover constitution-making (as in both countries studied here) is itself often a potent threat to whatever remains of the existing institutional order. In Subpart A, I discuss the prospects for different kinds of control, concluding in particular that external controls may fail in certain conditions. Subpart B intervenes in the debate on forum in constitution-making, suggesting that the framework presented here is

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186. See *id.* at 209–33 (describing similar processes in Russia, Belarus, and Kazakhstan).

187. See *supra* text accompanying note 130.

188. See, e.g., JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 38–65 (1996) (defining authoritarian regime types and explaining how these types affect a transition to democracy); 4 GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 15–36 (Guillermo O'Donnell & Philippe C. Schmitter eds., 1989) (making a more general argument based on transitions in Southern Europe and Latin America); Jose Antonio Crespo, *Party Competition in Mexico: Evolution and Prospects*, in DILEMMAS OF POLITICAL CHANGE IN MEXICO 57, 59–63 (Kevin J. Middlebrook ed., 2004) (explaining the long-run success of the dominant Mexican PRI party in these terms).

189. For the seminal work in this vein, see HUNTINGTON, *supra* note 50. For important applications of these ideas in modern political science, see, for example, BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 21–22 (Scott Mainwaring & Timothy R. Scully eds., 1995) (arguing that an important element in determining how a political system functions is how “institutionalized” its party system is); LEVITSKY & WAY, *supra* note 51, at 5 (arguing that competitive authoritarian regimes are a response to weakly institutionalized conditions).

relevant to that debate. Subpart C argues that high levels of public participation may in some conditions be more of a hindrance to the constitution-making process than a help. Finally, Subpart D responds to an important counter-argument—I argue there that the “constituent power” model is not necessary as a safety valve to allow for needed constitutional change in the name of historically disempowered groups, and that the risks of allowing such a safety valve outweigh its benefits.

*A. The Urgency and Difficulty of Finding Credible Forms of Control*

The key problem with respect to constraints in constitution-making is making those constraints credible or effective. We might highlight the point in the following way: the case studies suggest that pursuing a wholesale reconstruction of the constitutional order, rather than seeking reforms within the existing constitutional framework, may raise the risk of an unfavorable outcome. This is because constraint is often more difficult to achieve outside as opposed to inside a given constitutional framework. The complete reconstruction of a given constitutional order heightens ambiguities about rules and crises of order, and charismatic individuals or temporarily powerful parties can sometimes move outside of the existing constitutional framework in order to make an end-run around existing political institutions. Aside from the Venezuelan example here, two other recent attempts, by President Correa in Ecuador and President Zelaya in Honduras, show similar motivations: both sought to step outside the constitutional framework in order to achieve political goals that they lacked the power to achieve within it.<sup>190</sup> As Arato has pointed out, legalistic reform within the existing constitutional framework may lower these risks.<sup>191</sup> But the problem is that the choice to move outside of an existing constitutional framework is difficult to constrain, and is largely endogenous to the balance of politics in a given country. It is difficult to prevent sufficiently powerful actors or groups, like Chávez in Venezuela, from taking this step if they wish to do so.

Still, different forms of control of constitution-making processes may have different levels of efficacy. Existing scholars who advocate a restrained or non-sovereign model of constitution-making do not often

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190. On the events in Honduras, see e.g., NOAH FELDMAN ET AL., REPORT TO THE COMMISSION ON TRUTH AND RECONCILIATION OF HONDURAS: CONSTITUTIONAL ISSUES (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1915214](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1915214). On President Correa’s constitutional assembly in Ecuador, see Marc Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, 38 LATIN AM. PERSP. 47 (2011), available at <http://www.yachana.org/research/lap2011.pdf>.

191. See ARATO, *supra* note 34, at 80–84 (arguing that “legal continuity” and the use of amendment rules under the old constitution help to achieve consensus and improve the legitimacy of the new constitutional order).



consider whether the constraints imposed on the process will hold.<sup>192</sup> In contrast, the case studies show that external constraints can be problematic and must be carefully designed in order to prove effective. In particular, the use of judiciaries to constrain constitution-makers, as was done in South Africa and is often advocated as a model for other processes, may prove ineffective. Given this fact, it is probably better to prioritize measures that ensure that the assembly is internally diverse, so that no single faction can act unilaterally.

### 1. *Internal Diversity*

Assemblies that are internally diverse, and where single parties or factions do not achieve clear majorities, tend to induce broad pacting between political groupings as a matter of course. For example, one might contrast the constitution-making process in Colombia in 1991 to the two examples focused on in this Article. In that case as well, a stable but restricted, pacted democracy was breaking down, and the declining traditional parties were clashing with insurgent parties over the structure of political competition and the shape of the state.<sup>193</sup> But elections to the constituent assembly did not give a majority to any one party; instead, four groups won significant representation, with the largest party gaining only about one-third of the seats.<sup>194</sup> Thus, the process was dominated by a stable pact between the two major insurgent parties (including an ex-guerrilla organization) and the most moderate incumbent party.<sup>195</sup> The resulting constitution reconfigured politics in a way that created a more open and competitive (although still very flawed) political system.<sup>196</sup>

192. See *infra* text accompanying notes 203–206.

193. For more details on the background of the Colombian process, see, for example, John Dugas, *La Constitución Política de 91 ¿Un Pacto Político Viable?*, in *LA CONSTITUCIÓN DE 1991: ¿UN PACTO POLÍTICO VIABLE?* 15, 38 (John Dugas ed., 1993) [hereinafter *LA CONSTITUCIÓN DE 1991*]; RAFAEL BALLEEN M., *CONSTITUYENTE Y CONSTITUCIÓN DEL 91*, at 129–181 (1991); Fernando Cepeda Ulloa, *Colombia The Governability Crisis*, in *CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA*, *supra* note 57, at 193.

194. See John Dugas, *El Desarrollo de la Asamblea Nacional Constituyente*, in *LA CONSTITUCIÓN DE 1991*, *supra* note 193, at 45, 47 tbl.1 (giving the percentages of votes won by each group).

195. For example, the parties were forced to pact in order to agree on restructuring the judiciary, reworking electoral laws, and closing down the current congress. See Edgar Torres, *Dan Luz Verde a la Corte Constitucional*, *EL TIEMPO*, May 4, 1991, at 6A (judicial restructuring); HUMBERTO DE LA CALLE, *CONTRA TODAS LAS APUESTAS: HISTORIA ÍNTIMA DE LA CONSTITUYENTE DE 1991*, at 147–48, 210–12 (2004) (electoral rules and revoking of Congress). Across these cases, the resulting political configuration helped to open up these institutions to increased political competition.

196. See, e.g., Mauricio Cardenas et al., *Political Institutions and Policy Outcomes in Colombia The Effects of the 1991 Constitution*, in *POLICYMAKING IN LATIN AMERICA: HOW POLITICS SHAPES POLICIES* 199, 242 (Ernesto Stein & Mariano Tommasi eds., 2008) (“[T]he 1991 Constitution was a clear gain in terms of representativeness and legitimacy of the political system.”); Dugas, *supra* note 194 (arguing that the new constitution is a “viable political pact”); Fernando Cepeda Ulloa, *Colombia*

This suggests that to the extent possible, designers of constitution-making processes might want to prioritize electoral rules and other instruments that will help to achieve diversity. Many of these measures are well-known in the political science and institutional design literatures but are worth discussing briefly here.<sup>197</sup> First, it is obvious from the case studies that electoral law is a critical tool in translating popular support at a given point in time into seats. In Venezuela, Chávez successfully used a first-past-the-post system to ensure that he would receive far more seats than votes—he translated roughly 60% support into roughly 95% of the seats, therefore leaving opposition forces with virtually no voice. In Bolivia and Colombia, more proportional electoral systems helped to ensure that this kind of distorting effect did not occur; votes translated relatively directly into seats. Systems with single-member districts and similar majoritarian devices might have much to commend themselves in ordinary politics, where representativeness must be traded off against governance.<sup>198</sup> But as others have recognized, they make little sense in constitutional assemblies, where the pressing need is preventing a small faction from making an end-run around other forces and institutions.<sup>199</sup>

In contrast, few actors have considered the role of timing in the elections to a Constituent Assembly. The prevailing conception seems to be that timing is fixed by external events—actors are forced to write a constitution because of regime change or some other event outside of their own control, ensuring, as Elster argues, that constitutions are normally written in very difficult moments.<sup>200</sup> But even in cases of regime change, there may be some possibility of delaying elections, as the recent debate over the timing of the Egyptian elections shows.<sup>201</sup> Timing is particularly important for the elections to a constitution-making body because the work of that body will often have long-term consequences on the polity. In Venezuela, Bolivia, and Colombia, new constitutions were written in

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*Democratic Security, Political Reform*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA, *supra* note 64, at 209, 213 (stating that the 1991 constitution “helped encourage power sharing” and “helped channel numerous social, economic, and political conflicts into institutional forums”); Segura & Bejarano, *supra* note 70, at 232 (noting that a “democratic constitution” emerged from the “balanced Assembly” of Colombia).

197. For key works treating electoral rules and their influences on outcomes, *see, e.g.*, GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES, AND OUTCOMES* (2d ed. 1997); AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* (1984).

198. *See* SARTORI, *supra* note 197, at 39–48.

199. *See, e.g.*, Elster, *supra* note 1, at 395 (“Elections to the constituent assembly ought to follow the proportional system rather than the majority system.”); Ginsburg et al., *supra* note 29.

200. *See* ELSTER, *supra* note 6, at 78–80 (noting that constitution makers in Eastern Europe had little control over the timing of constitution-making and were forced to write new constitutions in situations that were not conducive to good constitution-making).

201. *See infra* text accompanying notes 243–252.

moments where old political orders were breaking down. The pacted democracies that had dominated all three countries prior to the constitution-making moment had lost legitimacy and thus electoral support. In Venezuela, the elections to the Constituent Assembly occurred in a moment in which the traditional parties had imploded, but no other political parties were well-organized enough to take their place. This left Chávez's movement as the only well-organized movement in the country; the lack of organized opposition to Chávez reflected not the lack of ideological opposition, but the lack of organization among the opposition at that point in time. In Bolivia, by contrast, the older parties had disintegrated but had been replaced not only by MAS but also by a strong, well-organized set of opposition parties in the East. And in Colombia, the traditional parties had been weakened but not completely destroyed; further, the newer political forces themselves were plural in nature.<sup>202</sup> This suggests that timing can sometimes make a big difference in determining how an assembly is composed and thus what constitutional program it enacts.

## 2. *External Control*

Prominent scholars have recommended models of constitution-making that emphasize controls on the constitution-making body. Arato argues, for example, that the two-stage process found in South Africa is an ideal model of constitution-making.<sup>203</sup> Indeed, the South African model is widely touted as an innovative and successful way to achieve a true constitutional moment—adherents emphasize that the process encouraged consensus and yet also involved a very high degree of participation, a point I return to below in Subpart D.<sup>204</sup> They also argue that it helped to facilitate higher forms of politics by allowing for political and social “learning” during the constitution-making process.<sup>205</sup> The South African model relies on a mix of internal and external controls—internally, in the first stage, the major players pact to form a transitional constitution that lays out basic principles, and then, in the second stage, a popularly elected constituent assembly or parliament is controlled externally by being made subject to basic ideas or

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202. See *supra* notes 193–194.

203. See ARATO, *supra* note 34, at 59–97 (using the South African constitutional process as a model for Iraqi constitution-making).

204. See, e.g., Heinz Klug, *Participating in the Design: Constitution-Making in South Africa*, 3 REV. CONST. STUD. 18 (1996) (arguing that the South African process enjoyed a high degree of legitimacy because it arose out of a very participatory process).

205. See ARATO, *supra* note 34, at 69–72 (stating that “[t]he two-stage process rightly constructed creates an intermediary site of learning, because it invites the constitution makers to learn between the two stages and apply the results when drafting the final constitution”).

principles found in the transitional constitution.<sup>206</sup> A constitutional court or similar body will judge whether the final constitution comports with the values of the initial constitution. The role of the court is “central” because it allows for “enforcement” of the external constraints represented by the transitional constitution.<sup>207</sup> This model would, of course, provide the kinds of controls against unilateral constitutionalism that I call for here. But there is no real explanation in the model of whether and when the constraints imposed on paper would prove to be effective in practice.

The case studies suggest that external constraints on constitution-making bodies can be problematic in some situations. Moreover, the major constraint in the South African case—the external supervision of a court—may be the least likely kind of constraint to work. In all three countries, judiciaries were supposed to play some role in controlling their Constitutional Assemblies, but their attempts bore little fruit. The efforts of the Venezuelan Supreme Court to use complex doctrines that would bind the assembly to the spirit but not the text of the existing constitutional order failed.<sup>208</sup> These constraints were ignored, and when they were ignored judiciaries did not do anything about it. A similar result obtained in the Colombian constitutional assembly in 1991—attempts by the Supreme Court to allow a constituent assembly while simultaneously imposing loose constraints on it proved ineffective.<sup>209</sup> And the judiciary in Bolivia played only a very small role in enforcing the textual constraints that existed on that Assembly. MAS was able to literally empty out the Constitutional Court, and even in the moment at which the Electoral Court blocked MAS from submitting its unilateral text to the people, the court took refuge in a dubious brand of legal formalism rather than confronting the majority head-on.<sup>210</sup>

A significant part of the reason for these failures may be doctrinal and conceptual—the lure of the “original constituent power” doctrine has always been powerful in Latin America, and this doctrine makes it quite

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206. See, e.g., Christina Murray, *Negotiating Beyond Deadlock From the Constitutional Assembly to the Court*, in *THE POST-APARTHEID CONSTITUTIONS*, *supra* note 46, at 103.

207. See ARATO, *supra* note 34, at 84–85.

208. See BREWER-CARÍAS, *supra* note 120, at 226–44.

209. In a divided ruling, the Colombian Supreme Court ruled that a constituent assembly could be held even though in the text of the constitution, the Congress is the only institution stated to have amendment power. See BALLEEN M., *supra* note 193, at 157–232 (reprinting the entire decision and its dissents). The majority of the Court held that the people constituted the “primary constituency, and therefore can at any time give themselves a constitution distinct from the one actually in force without subjecting themselves to the requirements that it consecrates.” *Id.* at 169–70. Still, as in Venezuela, the Court attempted to place vague limits on the Assembly, stating that it was required to act for the purpose of “strengthen[ing] the participatory-democratic system, via a participatory mechanism.” *Id.* at 171. Once the decision had been issued, these limits remained theoretical and were ignored; the judiciary did nothing for example when the assembly closed down the congress.

210. See Lehoucq, *supra* note 141, at 119.

difficult to place limits on an Assembly's actions.<sup>211</sup> This doctrine plays less of a role in other parts of the world, for example in common law countries. But another part of the story is political—courts are normally weak political actors. They are easy to politicize and they often have little credibility, popularity, or salience with the public. It may be too much to expect them to take a successful stand against a popular majority that controls a constitution-making body, especially when they are directly attacked or threatened by that majority. In South Africa, the judiciary had considerable capacity and was not perceived as highly politicized.<sup>212</sup> Further, no actor there saw an interest in seriously contesting the underlying rules of the game. These conditions will not always hold.

Bolivia suggests a second route that might work better. First, procedures for calling a constituent assembly were defined in the existing constitutional text. Such provisions appear to be rare in existing constitutional law, and they might indeed have drawbacks by encouraging too-frequent constitution-making. Further, in many cases, it will be impossible to define such procedures *a priori* because the new constitution is the result of a fundamental change in regime type (i.e. from an authoritarian to a democratic regime). But where possible, these kinds of provisions also hold out some potential to regulate the constitution-making process and therefore to ensure that it is not abused for narrow partisan ends. Second, both the constitutional text and the subsequent laws that Congress passed based on that text relied on two-thirds voting thresholds in both the Assembly and the Congress, rather than enunciating basic principles or values to which the text had to adhere. Voting thresholds are more difficult than principles to work around. And political actors may have substantial resources—popular support and salience—that courts lack. This is not to suggest that the Bolivian route, which barely held, is ideal or unproblematic; indeed, a larger point of the case studies is that external constraints are problematic in any form.

### *B. The Debate About Forum*

One of the most significant debates in the existing literature on constitution-making is about the forum: whether constitution-making is better carried out in ordinary legislatures or instead in specialized constitutional assemblies. As noted above, Elster and others assert that constitution-making should be done by a specialized body in order to minimize the role of group and institutional interests.<sup>213</sup> A different group

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211. For a discussion, see Colón-Ríos, *Legitimacy*, *supra* note 33.

212. See, e.g., Murray, *supra* note 206, at 119–21.

213. See *supra* text accompanying notes 20–25.

of scholars advocates for a model in which constitution-making is done by an ordinary legislature.<sup>214</sup> The evidence from Latin America suggests that the importance of this variable may be overstated. The outcome of a given process depends more on how the forum is composed and controlled than on what kind of forum it is. As an example, one can take the Venezuelan, Bolivian, and Colombian examples—all three were undertaken in specialized constituent assemblies, but with very different results. In Venezuela, the Assembly was indeed used by Chávez to consolidate a competitive authoritarian regime, although less by creating a very strong presidency on paper than by using the Assembly to clean out other institutions that were still controlled by the opposition. But in Bolivia and Colombia, the Assemblies were restrained—in Bolivia by external checks and in Colombia by the internal diversity of the Assembly itself—from carrying out the unilateral visions of any one party or actor.

That said, the choice of forum may not be irrelevant. In particular, it may be easier for strongmen and other figures to control the timing of elections to extraordinary political assemblies than to ordinary legislatures because the timing of elections to the latter tends to be fixed. This may tend to reduce the internal diversity of constitutional assemblies. In Venezuela, for example, Chávez was able to time the election of the Assembly for just after his presidential election victory, allowing him to maximize his support and gain far more seats than he possessed in the Congress. Further, it may be more difficult to exercise effective external control over a constitutional assembly. The idea that such an assembly exercises the full sovereignty of the people may be much stronger than is the case for ordinary political bodies.<sup>215</sup> In all three cases studied here, politicians, courts, and the public seemed effectively seduced by the idea that these assemblies genuinely represented the “original constituent power”; this conception may be largely due to regional legal culture, but also seemed due in part to the nature of the forum.<sup>216</sup> It is more difficult to make similar arguments about ordinary legislative bodies, although as the Egyptian example below shows, ordinary parliaments can also make similar claims.<sup>217</sup> Thus, the case studies indicate that the debate about forum may matter because it bears on the possibilities for exercising either internal or external control over the body.

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214. See *supra* text accompanying notes 26–29.

215. See, e.g., Colón-Ríos, *Legitimacy*, *supra* note 33 (explaining the force of the “constituent power” argument and giving examples of its application).

216. See Colón-Ríos, *Carl Schmitt*, *supra* note 33, at 384 n.62 (explaining the historical importance of the doctrine of “constituent power” in the region).

217. See *infra* text accompanying notes 254–276 (explaining the military’s efforts to impose “principles” on the constitution-making process and the reactions of the various political groups).

*C. Rethinking the Role of Participation*

Finally, the evidence here helps qualify one of the more important normative recommendations from existing work: that constitution-making should be highly participatory. Participation in constitution-making is said to increase the legitimacy of the constitution-making process, improve the quality of the product, and increase the civic virtue of citizens.<sup>218</sup> Further, some scholars, led by Thomas Franck, have asserted that there is an emerging norm of customary international law that constitution-making be a very participatory process.<sup>219</sup> These scholarly views in favor of participation are closely linked to the dualist theory of democracy, which holds that constitution-making moments are qualitatively different from ordinary political moments.<sup>220</sup>

Empirical evidence on these claims about the value of participation is mixed. There are cases where high degrees of public participation have been successfully integrated into constitution-making processes: South Africa is a well-known example.<sup>221</sup> The fascinating process in Iceland, where the drafting council is making massive use of social media to get input into the process, may be another.<sup>222</sup> However, one large-*n* empirical study of post-conflict constitution-making found that levels of participation had no effect on post-constitution-making levels of violence in many regions of the world.<sup>223</sup> Further, Moehler's detailed fieldwork in Uganda found that citizens who had participated in that country's constitution-making process actually developed lower levels of trust in government than their fellow citizens who had participated less.<sup>224</sup> Rather than instilling a sense of civic virtue, participation disenchanted citizens by acquainting them with a dysfunctional political system.

Levels of participation in the examples studied for this Article were not highly correlated with the values attributed to participation. It is commonly noted in the literature that forms of participation such as referenda may have little effect on the process because they may be too manipulable to

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218. See *supra* text accompanying notes 36–42.

219. See *supra* text accompanying note 41.

220. See *supra* text accompanying note 36.

221. See Klug, *supra* note 204, at 18–59.

222. See Cheryl Saunders, *Constitution-Making in the 21st Century*, 2012 INT'L REV. L., no. 4, 2012, at 1, 8.

223. See Jennifer Widner, *Constitution Writing and Conflict Resolution* (UNU-WIDER Research Paper No. 2005/51, Aug. 2005); see also Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513 (2008) (discussing these results).

224. See DEVRA C. MOEHLER, *DISTRUSTING DEMOCRATS: OUTCOMES OF PARTICIPATORY CONSTITUTION MAKING* (2008).

control power.<sup>225</sup> But more hands-on forms of constitution-making like civil society participation may also do little to enhance either the quality or legitimacy of the constitutional product. In Venezuela, very high levels of participation by civil society had no real impact on the final product but rather tended to affect peripheral provisions that were unimportant to Chávez and which constituted mere window-dressing. High levels of civil society participation did not prevent the constitution from being used to impose a competitive authoritarian regime.<sup>226</sup>

Bolivia offers a more important point: very high levels of participation, at least in a polarized political environment, may make constitution-making much more difficult and may thus threaten a breakdown of order.<sup>227</sup> Elster and others have noted that conducting deliberations in public may sometimes make agreement more difficult because representatives working under the conditions may stick to their principles and be unwilling to make hard political compromises.<sup>228</sup> But what happened in Bolivia is more what Elster calls “threat-based bargaining”: both sides attempted to mobilize portions of the masses in order to pressure the other side into a favorable deal.<sup>229</sup> The trouble is that this is a dangerous game in two senses. First, as Elster notes, the masses on each side, once mobilized and ideologically charged, may narrow the range of possible agreement, perhaps even causing it to disappear entirely.<sup>230</sup> Bolivian delegates were unwilling to make deals that they otherwise would have cut for fear of angering their mass supporters. Second, the mobilized masses might start agitating for

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225. See, e.g., HART, *supra* note 40, at 35–36 (“The oft-cited function of legitimizing the text, essential if a culture of constitutionalism is to support its implementation, may not be achieved merely by casting a vote.”). But see Ginsburg et al., *supra* note 29 (finding a correlation between referenda and the number of rights provisions included in the constitutional text).

226. Some evidence also suggests that constitutions can be legitimate even if they are not highly participatory and are largely a product of elite pacts or “gentleman’s agreements”; Colombia stands as an example. The referendum on whether to call the Assembly and the elections to that Assembly (which were held concurrently) received only 3,541,480 votes (2,696,826 in favor, 71,836 against, with 772,818 blank ballots), an extraordinarily high abstention rate of 75%. See BALLEEN M., *supra* note 193, at 241–42 (explaining the reasons for this very low turnout and the sense of “institutional crisis” that it provoked); Dugas, *supra* note 193, at 38 (noting that the important series of discussion that resulted in the closing of the current congress “was marked by many of the historical characteristics of Colombian political pacts” including “an exclusionary nature” and a “genesis in a series of ‘conversations among gentlemen’”).

227. This point is well-supported in the regime transition literature but often forgotten. See, e.g., GUILLERMO O’DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (1986) (discussing the problems that can arise from popular participation at the wrong times or in the wrong ways); HUNTINGTON, *supra* note 50 (discussing the problems that arise when high levels of participation precede the development of political institutions necessary to contain and channel them).

228. See Elster, *supra* note 1, at 388–89.

229. See *id.* at 390–93 (giving examples of threats such as military force that shaped constitution-making in France).

230. See *id.* at 388–89.



their own purposes and not those of the political elites. In Bolivia, the assembly essentially broke down over an issue, the location of the capital city, which was pushed by the masses in Sucre rather than by any of the party elites. These conditions—highly mobilized and polarized mass supporters—may be fairly common during regime changes in the developing world. As noted below, in some respects Egypt may combine similarly high levels of participation with significant polarization.<sup>231</sup> And constitutional moments combine sets of factors that may make mass participation particularly difficult to process: mass expectations are often unrealistically high, and there are no institutional frameworks capable of channeling the public's demands.

None of this indicates that mass participation is a bad idea under all circumstances. But it may help qualify its utility: in certain circumstances, direct mass participation appears manipulable, and in poorly institutionalized environments mass participation can actually help contribute to a democratic breakdown.

#### *D. Constrained Constitutionalism and the Need for Flexibility*

The deliberative democracy rationale provided by Elster and Ackerman is not the only, and perhaps not even the best, defense of the constitutional moment theory. An alternative defense relies on the need for flexibility in constitutional systems. The clearest recent articulation of this defense is made by Joel Colón-Ríos, who argues that the “original constituent power” doctrine has played a positive role in Latin America as a kind of safety valve.<sup>232</sup> Ordinary political institutions often become warped by the interests of particular powerful actors and no longer serve the public good. The original constituent power doctrine allows for radical change in the interests of disempowered groups, and this kind of change would be impossible without the existence of the doctrine.<sup>233</sup>

This challenge to the constrained model is powerful and thought-provoking. In this Subpart I content myself with offering a few responses. First, as with claims that the original constituent power is being exercised on behalf of the people, claims that such power is being exercised on behalf of historically disenfranchised groups are sometimes—and perhaps usually—abused. It can be tempting for powerful individuals and groups to claim that they are blowing up the institutional order to aid groups who have been unjustly treated; these claims can be masks for what are

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231. For a discussion, see *infra* text accompanying note 239–252.

232. See, e.g., Colón-Ríos, *Carl Schmitt*, *supra* note 33, at 384 n.62; Colón-Ríos, *Legitimacy*, *supra* note 33.

233. See Colón-Ríos, *Legitimacy*, *supra* note 33.

essentially power grabs by would-be dictators. The contrast between Bolivia and Venezuela might be illustrative here; while it is plausible in the Bolivian case to say that power was being exercised on behalf of historically disenfranchised indigenous groups, such a claim is more dubious in Venezuela, where Chávez used the process largely to consolidate his own hold on power (which he never subsequently relinquished).

More fundamentally, there are serious questions about whether the constituent power model of political change is effective at creating positive change. These models tend to function via domination of one group by another and particularly by excluding historic elites from power. But these excluded groups then tend to either use their resources to destabilize the new regime (as would have happened in Bolivia) or to simply exit the country (as has happened in part in Venezuela). Under either scenario, governance and economic development becomes much more difficult.

Further, observers have noted two patterns of leftist government in Latin America.<sup>234</sup> Under the first model, observed in Venezuela, Bolivia, and Ecuador, governments have relied on exercises of constituent power to radically remake the institutional order, and to exclude political and economic elites from the preceding regime (who are perceived as corrupt and ineffective) from power.<sup>235</sup> Under the second model, observed in Brazil, Chile, and Uruguay, governments instead have attempted to enact reforms within the existing constitutional order, relying on these institutions to enact incremental reforms.<sup>236</sup> While all is not equal between these two groups of countries (the second group, for example, has tended to have stronger institutional structures than the first), the second approach appears to have paid generally bigger dividends and paid far fewer costs. These governments have made important changes to social policies without sacrificing economic growth or political stability.<sup>237</sup>

## V. THE THEORY APPLIED: EGYPT IN PERSPECTIVE

In this Part, I briefly apply the theory to the just-completed efforts at constitution-making in Egypt. I cannot provide anything like a full

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234. See, e.g., Steven Levitsky & Kenneth M. Roberts, *Introduction Latin America's "Left Turn" A Framework for Analysis*, in *THE RESURGENCE OF THE LATIN AMERICAN LEFT 1* (Steven Levitsky & Kenneth M. Roberts eds., 2011) (distinguishing among different kinds of leftist governments in the region); Jon Beasley-Murray et al., *Latin America's Left Turns A Tour d'Horizon*, in *LATIN AMERICA'S LEFT TURNS*, *supra* note 130, at 1.

235. See Maxwell A. Cameron & Kenneth E. Sharpe, *Andean Left Turns Constituent Power and Constitution Making*, in *LATIN AMERICA'S LEFT TURNS*, *supra* note 130, at 61.

236. See Steven R. Levitsky & Kenneth M. Roberts, *Conclusion Democracy, Development, and the Left*, in *THE RESURGENCE OF THE LATIN AMERICAN LEFT*, *supra* note 234, at 399, 401 tbl.C.1.

237. See generally *THE RESURGENCE OF THE LATIN AMERICAN LEFT*, *supra* note 234.

perspective on the current political and social movements in the country; nor is my aim here to provide normative advice. Further, I do not wade into the extremely complex debate over the value of the final constitutional product or its individual provisions.<sup>238</sup> My goals instead are far more modest: I seek to show that the perspective presented in this Article is useful for understanding recent events. My primary point is that the role of the military is more complex than sometimes recognized—in a context raising many of the risks of a worst-case outcome, the military might actually play a positive role in stabilizing the emerging democracy and preventing an authoritarian outcome. This analysis thus contributes to Sam Issacharoff's important point—fragile or unstable democratic regimes might require undemocratic features in order to survive.<sup>239</sup>

The fall of Hosni Mubarak in Egypt in February 2011 ended a military-linked authoritarian regime that had lasted for decades and placed the country into a situation that is similar to, but more severe than, the regime breakdowns in the Latin American case studies.<sup>240</sup> An important challenge in such an environment is the reconstitution of order and the reconstruction of political institutions. This is a task that might not happen at all, or (perhaps more likely) might happen but under a non-democratic or weakly democratic regime.

While Mubarak's authoritarian party (the National Democratic Party) was disbanded, new political movements are nascent, and some movements are already well-organized. As in Venezuela, the situation was one in which political organization during the constitution-making process was asymmetric; in general, Islamist parties were already organized while liberal forces were not, and forces close to the old regime were in a process of possible reconstitution.<sup>241</sup> The organized political forces are recognized by observers as largely pursuing their short-term political interest.<sup>242</sup> In

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238. See, e.g., Clark Lombardi & Nathan R. Brown, *Islam in Egypt's New Constitution*, Post to *The Middle East Channel*, FOREIGN POLICY (Dec. 13, 2012, 10:23 AM), [http://mideast.foreignpolicy.com/posts/2012/12/13/islam\\_in\\_egypts\\_new\\_constitution](http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution).

239. See Issacharoff, *supra* note 4, at 1405 (arguing that weaker democracies may need to have mechanisms in place that limit the rights of extremist groups as a means of self-preservation); see also Ozan Varol, *The Democratic Coup d'Etat*, 53 HARV. INT'L L.J. 292 (arguing that militaries are not necessarily anti-democratic actors during democratic transitions).

240. See, e.g., JEREMY M. SHARP, CONG. RESEARCH SERV., RL 33003, EGYPT IN TRANSITION 9–10 (2011).

241. See INT'L FOUND. FOR ELECTORAL SYS., ELECTIONS IN EGYPT: ANALYSIS OF THE 2011 PARLIAMENTARY ELECTORAL SYSTEM (2011) [hereinafter ELECTIONS IN EGYPT: ANALYSIS] (“Analysts also identify the FJP [the Islamist Muslim Brotherhood party] . . . and remnants of the National Democratic Party as the most coherent and organized movements.”).

242. See, e.g., Mara Revkin, *The Brewing Battle over Egypt's Constitution*, ATLANTIC COUNCIL (Jan. 6, 2012), <http://www.acus.org/egyptsource/brewing-battle-over-egypts-constitution> (recognizing that the Islamist Freedom and Justice party is seeking to use its currently strong political position to remake the rules in its favor).

such an environment, the risk recognized in this Article—that unilateral control of the assembly will lead to a non-democratic outcome—was very real. And it is mainly the structure of the constitution-making process—the asymmetric organization of political forces and the sovereign nature of the assembly—rather than the ideology of any particular group that created the risk. Finally, it is worth noting that these risks are exacerbated by the weakness of remaining institutions (most of which have either been dissolved or are badly tainted by association with the prior regime) and by the high levels of mass participation outside of any institutional framework. Mass protests were helpful in toppling Mubarak, but as the Bolivian case showed, they can make constitution-making processes far more difficult and traumatic.

*A. Asymmetric Organization and the Failure to Achieve Internal Diversity*

The electoral rules for parliamentary elections in Egypt, which were imposed by the military (but also at points negotiated with major political forces), were highly complex and seemed designed partly to avoid dominance by any one group.<sup>243</sup> And since the parliament had been tasked with selecting the constituent assembly; this would presumably have helped avoid single-party dominance in the assembly as well. In the elections to the lower chamber of parliament, for example, two-thirds of seats were allocated by closed-list proportional representation in large districts, thus avoiding the type of distortion of votes into seats that occurred in Venezuela.<sup>244</sup> The remaining one-third of seats were allocated via personalized voting in very small districts (similarly to the electoral system in the US); this type of system can cause an overrepresentation of majority forces (as occurred in Venezuela), but it was thought that the personalized dimension of the process would allow independents and figures associated with the prior regime to win large numbers of seats.<sup>245</sup>

In practice, the electoral rules did not do a particularly good job of dispersing authority in the parliament. The Muslim Brotherhood (running as the Freedom and Justice Party) won about half the seats in the lower

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243. See ELECTIONS IN EGYPT: ANALYSIS, *supra* note 241, at 2–3 (explaining the process by which the new electoral laws were adopted); see also *id.* at 4 (noting that “analysts expect a highly fragmented political race with no one party or coalition coming close to a majority of the national vote”).

244. See *id.* at 3–4.

245. See *id.* at 4 (“Analysts expect those [personalized seats] . . . to be largely filled by local prominent citizens and former NDP partisans.”). The system differs from the U.S. system in that two candidates are elected from each district. See *id.* at 3. Another factor expected to work in favor of greater fragmentation was the fact that elections were staggered over a span of about three-and-a-half months, between November 2011 and March 2012. See *id.* at 4.

house, and the conservative Islamist Al-Nour party won another 25%.<sup>246</sup> Several smaller liberal parties and figures close to the old regime won the remaining quarter.<sup>247</sup>

A similar result obtained in the presidential election. Most observers pushed for a rapid and complete transition to democracy.<sup>248</sup> This had a critical effect on the timing of presidential elections: parties and analysts pushed for very quick presidential elections, prior to the constitution-making process, as a way to push the military more fully out of power.<sup>249</sup> This election was also won by the candidate of the Muslim Brotherhood, Mohamed Morsi, who defeated a candidate who was very close to the old regime (former Prime Minister Ahmed Shahaq) by a 51–48 margin.<sup>250</sup>

Thus, a single movement has dominated Egypt's early elections. This suggests the importance of the timing variable discussed above. The conditions of asymmetric organization in Egypt did indeed seem to affect the outcome. Observers have recognized that the Muslim Brotherhood and Al-Nour were far more organized under the old regime, especially locally, than other political forces.<sup>251</sup> The absence of support for more liberal or secular candidates may indicate a true lack of support, but it may also indicate failures of organization. Party-building takes time. Moreover, the perspective presented in this Article suggests that early presidential

246. See Leila Fadel, *Final Results Confirm Islamists Winners in Egypt's Elections*, WASH. POST (Jan. 21, 2012), [http://www.washingtonpost.com/world/.../gIQAXpwbGQ\\_story.html](http://www.washingtonpost.com/world/.../gIQAXpwbGQ_story.html) (stating that the Freedom and Justice Party won 47% of seats in the lower house, and the conservative Islamist Salafist Nour party won 25%).

247. *Id.*; but see *Egypt Elections Results Show Islamists Taking Two Thirds of Seats*, DAILY TELEGRAPH (Jan. 21, 2012, 7:21 PM), [http://www.telegraph.co.uk/news/worldnews/africaandindian\\_ocean/egypt/9030179/Egypt-election-results-show-Islamists-taking-two-thirds-of-seats.html](http://www.telegraph.co.uk/news/worldnews/africaandindian_ocean/egypt/9030179/Egypt-election-results-show-Islamists-taking-two-thirds-of-seats.html) (providing voting results for the two-thirds of Egypt's lower house seats that are decided based on closed party lists).

248. See, e.g., Editorial, *Egypt's Elections*, N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/opinion/egypts-elections.html> (lamenting that the current pace of the transition "could leave the military in charge for another year or more" and stating that the military must "commit to a specific date for ceding power"); Marc Lynch & Steven A. Cook, Op-Ed., *U.S. Policy on Egypt Needs a Big Shift*, N.Y. TIMES (Nov. 30, 2011), <http://www.nytimes.com/2011/12/01/opinion/us-policy-on-egypt-needs-a-big-shift.html> (stating that "Washington should put the Egyptian military, which receives \$1.3 billion annually from the United States, on notice that the officer's efforts to carve out a post-transition political role for themselves is unacceptable."); see also The White House, *Statement by the Press Secretary on Recent Events in Egypt*, Nov. 25, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/11/25/statement-press-secretary-recent-developments-egypt> ("Most importantly, we believe that the full transfer of power to a civilian government must take place in a just and inclusive manner that responds to the legitimate aspirations of the Egyptian people, as soon as possible.").

249. See, e.g., Revkin, *supra* note 242 (stating that secular and liberal groups sought an immediate presidential election in order to end military rule).

250. David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES (Jun. 24, 2012), <http://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html>.

251. See Revkin, *supra* note 242.

elections can be problematic: executives are often (although not always) the main forces pushing for authoritarian or non-democratic regime.<sup>252</sup> There is often substantial risk that an executive with control or near control over the constituent assembly can weaken the prospects for a competitive democratic outcome. Thus the electoral landscape in Egypt, coupled with the organizational asymmetries on the ground, produced a substantial risk of an undemocratic or weakly democratic outcome.

### *B. The Mixed Record of External Control*

The most analytically complex element of the Egypt situation has been the role that the military and the judiciary, working together, have played to counter this threat. The irony is that while these elements, working on their own, are probably an even greater threat to democracy than the unequal electoral playing field, in the specific context of Egypt they have helped to control the dominant electoral faction (the Muslim Brotherhood) in ways that help to avoid a worst-case outcome. This analysis thus complements recent work by Ozan Varol, who has used the historical experiences in Turkey, Portugal, and elsewhere to argue that the military is a complex actor that can sometimes play a pro-democratic role.<sup>253</sup> At the same time, the analysis supports a key conclusion from the Latin American case studies: using external institutions like courts to limit the power of constituent assemblies is a difficult strategy to pull off.

The military's early attempts to channel and control the constitution-making process were clumsy, and in particular alienated liberal elements who might have supported some controls over the dominant electoral actors. Well before parliamentary and presidential elections had been held, the military attempted to impose sets of principles on the Constituent Assembly and to give the Constitutional Court the power to review the principles.<sup>254</sup> When the idea was first floated in the summer of 2011, the idea was that these principles would give some protection to the military's corporatist interests, while also aiding secular and liberal groups.<sup>255</sup> The Freedom and Justice party steadfastly opposed any attempt to restrict the Assembly's power (since such an effort was likely to hurt their political

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252. See *supra* Subpart III.A (discussing Chávez's use of the constituent assembly to create a competitive authoritarian regime); Partlett, *supra* note 29 (explaining how strong executives in former Soviet countries used extraordinary constitution-making processes to entrench themselves in power).

253. See Varol, *supra* note 239.

254. For an overview, see INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, DECLARATION OF THE FUNDAMENTAL PRINCIPLES FOR THE NEW EGYPTIAN STATE, DRAFT DATED 1 NOVEMBER 2011: A COMMENTARY 4 (2011) [hereinafter DECLARATION OF THE FUNDAMENTAL PRINCIPLES], available at [http://www.constitutionnet.org/files/2011.11\\_-\\_commentary\\_on\\_fundamental\\_principles\\_english\\_final.pdf](http://www.constitutionnet.org/files/2011.11_-_commentary_on_fundamental_principles_english_final.pdf).

255. See *id.*

interests most of all); most media and outside observers agreed, viewing the military's effort as blatantly undemocratic.<sup>256</sup> The draft principles actually floated in November 2011 focused largely on carving out a massive role for the military within the new democratic order, but they also suggested that military itself (rather than the parliament) would play the dominant role in selecting the members of the Constituent Assembly.<sup>257</sup> They would have ensured the military full autonomy over its budget and a veto over any bills that related to the armed forces, for example.<sup>258</sup> These principles were rejected by virtually all political actors, many of whom took to the streets in massive protests (which led to forty deaths), and the military quickly withdrew them.<sup>259</sup>

This fiasco suggested again that imposing external control on an assembly is indeed very difficult. The political groupings around the Freedom and Justice Party had great success in arguing that any restrictions on the sovereignty of the parliament and the assembly would be per se undemocratic.<sup>260</sup> They were able to argue these points despite the fact that many recent examples of constitution-making, most notably in South Africa, have been constrained in similar ways.<sup>261</sup> Further, the course of dealing suggests strategic miscalculations by both the liberal/secular parties and the military. The military's draft set of principles seem to have been intended as a starting point for bargaining, but the included principles were

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256. See, e.g., *id.* (noting that the Muslim Brotherhood and Freedom and Justice party referred to the effort as "an illegitimate and undemocratic usurpation of the people's will."); Guide to Egypt's Transition, *Constitutional Principles*, CARNEGIE ENDOWMENT FOR INT'L PEACE, [hereinafter *Constitutional Principles*], <http://egyptelections.carnegieendowment.org/2011/10/04/constitutional-principles> ("Despite the efforts by many, . . . the Muslim Brotherhood continued to reject the concept of supra-constitutional principles, noting that any constitutional agreement before the elections was undemocratic and harkened back to the Mubarak era.").

257. See DECLARATION OF THE FUNDAMENTAL PRINCIPLES, *supra* note 254, at 31 (explaining that the assembly would be composed of 20 members chosen from the Parliament, and of 80 members chosen from among various corporatist bodies like the universities, judges, and trade unions). Observers believed that although the provision is textually ambiguous, the "Supreme Council of the Armed Forces [would] be responsible for appointing these 80 members." *Id.* at 18.

258. See *id.* at 29 ("The Supreme Council for the Armed Forces is solely responsible for all matters concerning the armed forces, and for discussing its budget, which should be incorporated as a single figure in the annual state budget. The Supreme Council for the Armed Forces is also exclusively competent to approve all bills relating to the armed forces before they come into effect.").

259. See Matt Bradley, *Egyptian Military Draws Fire over Politics*, WALL ST. J. (Nov. 3, 2011), <http://online.wsj.com/article/SB40001424052970204621904577014132319073706.html> (stating that a "broad cross-section of Egyptian political parties lodged strong objections" to the principles and describing street protests that had been called in response); Edmund Blair, *Egypt Army Affirms Parliament Role over Constitution*, REUTERS, Dec. 11, 2011, available at <http://www.reuters.com/article/2011/12/11/us-egypt-constitution-idUSTRE7BA09720111211> (noting that the military had dropped the idea of playing a role in appointments to the assembly).

260. See Bradley, *supra* note 259.

261. See, e.g., Murray note 206, at 103 (describing the South African model, where the parliament that drafted the final constitution was subject to principles found in an interim constitution, as judged by the South African Constitutional Court).

so outrageous (particularly the provision giving the military power to appoint most of the Assembly) that they were rejected out of hand by all the nascent political forces and thus left no room for further bargaining. Had a serious effort at such a pact occurred, it is possible that a more widely embraced set of principles could have emerged, which would have traded some guarantees for liberal and secular constitutional principles against some guarantees for the military within the constitutional order.<sup>262</sup>

The military's subsequent attempts to channel and limit electoral democracy were somewhat more sophisticated and effective. In recent efforts, the military has preferred to work through its allies, the courts, which are still stacked with personnel from the Mubarak era. While the judiciary is tainted by its association with the military regime, it may be a relatively legitimate institution in an environment where virtually all institutions have been discredited, destroyed, or both. The Egyptian Supreme Constitutional Court, for example, is a high capacity institution that was considered relatively independent during the military regime.<sup>263</sup> In a preliminary ruling, the Supreme Administrative Court first suspended the Constitutional Assembly appointed by the Parliament, holding that the draft principles promulgated by the military were potentially in force and that the Assembly may not have been appointed in accord with those principles.<sup>264</sup> Then, in June, the Constitutional Court issued a ruling dissolving the Parliament itself, holding that the electoral rules used to elect some of its members were improperly promulgated.<sup>265</sup> Another judicial decision by the Constitutional Court threw out rules that would have prevented Mubarak loyalists from running for president.<sup>266</sup> All of these maneuvers were

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262. Cf. *Constitutional Principles*, *supra* note 256 (noting that civil society organizations and educational institutions had written draft principles in June and July 2011 that had received broad approval from across the political spectrum). Further, after the missed opportunity the Muslim Brotherhood and the military may have made a pact, where the former agrees to respect the latter's power so long as the military leaves the constitution-making process free of its influence. See Revkin, *supra* note 242.

263. See, e.g., TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007) (describing and explaining the relatively high level of independence of the Constitutional Court during the dictatorships of Sadat and Mubarak).

264. See *Egypt's Supreme Administrative Court Suspends Embattled Constituent Assembly*, AHARAM ONLINE (Apr. 10, 2012), <http://english.ahram.org.eg/NewsContent/1/64/38936/Egypt/Politics-/Egypts-High-Administrative-Court-suspends-embattle.aspx>.

265. See Borzou Daragahi, *Egypt Court Orders Parliament Dissolved*, FIN. TIMES (June 15, 2012, 11:12 AM), <http://www.ft.com/cms/s/0/02c5e588-b61c-11e1-a511-00144feabdc0.html>.

266. See INT'L FOUND. FOR ELECTORAL SYS., *ELECTIONS IN EGYPT: IMPLICATIONS OF RECENT COURT DECISIONS ON THE ELECTORAL FRAMEWORK 9–10* (2012) [hereinafter *ELECTIONS IN EGYPT: IMPLICATIONS*].



predictably denounced by the Muslim Brotherhood and by outside observers as “judicial coups” or as “thuggish” actions.<sup>267</sup>

These denunciations, particularly those made by outside observers, risk misunderstanding the result of the judiciary’s actions. These decisions appeared to have served as the starting point for negotiations between elected officials (including Morsi) and the military and judiciary, not as an end game that put a stop to the democratization process.<sup>268</sup> Litigation and negotiations continued on the decisions that suspended the Assembly and dissolved Parliament.<sup>269</sup> A second Constituent Assembly was selected to replace the suspended one, and that Assembly continued its work even though its “parent” institution, the Parliament, remained dissolved.<sup>270</sup>

In the end the newly elected Morsi partly defanged both the military and the judiciary. He replaced many of the top military leaders and in November 2012 issued a decree insulating his decrees and the actions of the Assembly from judicial review until the new constitution was drafted.<sup>271</sup> He reversed much of that decree after popular outcry.<sup>272</sup> The Islamist-dominated Constituent Assembly, after the resignations of many of the other members, passed a new constitution in December 2012, and the constitution was approved by popular referendum, with 64% supporting the document in a low-turnout election.<sup>273</sup>

The experience raises three points. First, the Egyptian experience shows again the great difficulty of efforts at external control. It is not clear that the efforts by the judiciary and military completely failed, even though Morsi was able to weaken both groups. The various decisions by the courts, and the threat of further action, may have influenced the final constitutional

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267. See, e.g., David D. Kirkpatrick, *Egyptian Leaders Meet in Defiance of Court and Military*, N.Y. TIMES (July 10, 2012), <http://www.nytimes.com/2012/07/11/world/middleeast/egyptian-parliamentary-deputies-defy-court-and-military.html>.

268. The military responded to the Constitutional Court decision dissolving parliament by revising its draft principles in order to aggrandize its own power. For example, the revised principles stated that the military would exercise parliamentary powers in the interim and purported to give the military even more power to appoint the Constitutional Assembly under certain conditions. See ELECTIONS IN EGYPT: IMPLICATIONS, *supra* note 266, at 5–6. Morsi, once sworn in, defied the ruling by calling Parliament to order; the Constitutional Court responded by reiterating its order and threatening both the president and Parliament.

269. See, e.g., Kirkpatrick, *supra* note 267.

270. See *Egypt Power Struggle Assembly Backs Draft Constitution*, BBC NEWS (Nov. 30, 2012, 5:51 AM), <http://www.bbc.co.uk/news/world-middle-east-20551575>.

271. See David D. Kirkpatrick & Mayy El Sheikh, *Citing Deadlock, Egypt’s Leader Seizes New Power and Plans Mubarak Retrial*, N.Y. TIMES (Nov. 22, 2012), <http://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html>.

272. See Jeffrey Fleishman & Reem Abdellatif, *Egypt’s Morsi Reverses Most of Decree that Expanded His Powers*, L.A. TIMES (Dec. 8, 2012), <http://articles.latimes.com/2012/dec/08/world/la-fig-egypt-morsi-20121208>.

273. See Matt Bradley, *Egypt Voters Approve Constitution*, WALL ST. J. (Dec. 25, 2012, 8:25 PM), <http://online.wsj.com/article/SB10001424127887323291704578201581552807980.html>.

product in certain ways.<sup>274</sup> Nonetheless, the electorally dominant political forces can easily make judicial or military attempts at interference seem deeply undemocratic and illegitimate. Further, as in Bolivia, external control is a limited strategy because it is difficult to make adversary groups engage in dialogue. The judiciary was able to slow down the process and impose roadblocks, but could not force the dominant groups to engage in serious roundtable discussions with electorally weaker parties.<sup>275</sup> However desirable roundtable discussions might be, they appear to be very difficult to mandate through design when the most powerful forces do not want them.

Second, the judiciary in Egypt had more power than the Venezuelan or Bolivian judiciaries precisely because, unlike in those other countries, it was backed by an institution of power—the military. This suggests a difficult tradeoff. Those institutions best able to control power in fluid, deinstitutionalized contexts may be precisely those institutions most dangerous to democracy. The military is useful as an effective counterweight to dangerous forces in the new democracy; at the same time, it is itself a significant threat to that democracy.

Finally, militaries, even ones previously involved in dictatorial regimes, do not necessarily play an undemocratic role in the constitution-making process. In some conditions, they may facilitate democratization, precisely by avoiding the worst-case scenarios outlined above. It is certainly possible for a country to begin a transition to democracy as a restricted democracy, with the military playing a substantial role, and to gradually reduce that role through time.<sup>276</sup> Such a model may sometimes have the benefit of allowing for institution-building, and also allowing political forces to organize and to mature. Thus the steadfast opposition of political parties and outside observers to any military role in the new regime is understandable but not obviously correct. It is right to see the

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274. Although, some of these influences were not democratically productive. For example, there is considerable evidence that the military was bought off by giving it significant power over its own affairs and by protecting the jurisdiction of the military courts. See Tom Ginsburg, *The Real Winner in the Egyptian Constitution? The Military*, ICONNECT: BLOG OF THE INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (Dec. 10, 2012), <http://www.iconnectblog.com/2012/12/the-real-winner-in-the-egyptian-constitution-the-military/>.

275. See Andrew Arato, *Awful Process, Terrible Ending and (Most Likely) Disastrous Results*, ICONNECT: BLOG OF THE INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (Nov. 29, 2012), <http://www.iconnectblog.com/2012/11/awful-process-terrible-ending-and-most-likely-disastrous-results/>.

276. Turkey and Chile are two important examples: in both cases an initially highly restricted framework giving the military considerable power over civilian officials has been weakened through time. See, e.g., Issacharoff, *supra* note 4, at 1440–45 (explaining the evolution of the regime in Turkey); Peter M. Siavelis, *Chile The End of the Unfinished Transition*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA, *supra* note 64, at 177, 196–200 (explaining how constitutional changes and changes in informal norms gradually subordinated an initially strong military to civilian politicians and institutions).

military as a threat to democracy, but wrong to see it as the only threat. And there likely are configurations under which the military could help to stabilize the new regime.

## VI. CONCLUSION

I have argued here that constitution-making should often be dominated by a risk-averse calculation: domestic and international policymakers should focus on avoiding a worst-case outcome, rather than trying to reach an idealized first-best world of transformative, deliberative democracy. In Egypt, as in many weakly institutionalized environments, the risks of the constitution-making process may outweigh its benefits. The country appears unlikely to be saved through the constitution-making moment, but constitution-making has the risk of being a critical juncture that puts Egypt on the path of authoritarian, weakly democratic, or unstable regimes.

More generally, a better understanding of constitution-making in many situations is one that does not view these moments as a higher form of politics, but instead as a more dangerous form of politics, because of the absence of clearly defined and credible institutions and rules. There are broader lessons here for transitions from non-democratic regimes: the crisis of order may sometimes be a more fundamental problem than the need to construct democracy.<sup>277</sup> The breakdown of basic institutional order that attends these moments is a serious challenge for democratic transitions. Political actors in the new regime are often forced to choose between two undesirable options, salvaging some aspects of the non-democratic regime as building blocks for the new order, or destroying them, thus making a crisis of order and capacity worse.<sup>278</sup> An important paradox of modern regime transition is that it might sometimes be necessary to preserve undemocratic enclaves in a new regime in order to create a viable democracy.<sup>279</sup>

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277. This is a central point of Sam Huntington. See HUNTINGTON, *supra* note 50, at 1 (“The differences between democracy and dictatorship are less than the differences between those countries whose politics embodies consensus, community, legitimacy, organization, effectiveness, stability, and those countries whose politics is deficient in these qualities.”).

278. Arato argues that the United States faced such a choice in Iraq and took a problematic route by destroying both the military and the state. See ARATO, *supra* note 34, at 1–57.

279. See *supra* note 276 (discussing Turkey and Chile as two examples of restricted regimes that gradually reduced the military role in their democracies through time).